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No. 15320

United States
Court of Appeals
for the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILE

DEC 14 1956



No. 15320

United States
Court of Appeals
for the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

MOORE & ROMLEY,
First National Bank Building,
Phoenix, Arizona,

Attorneys for Appellants.

JACK D. H. HAYS,
United States Attorney;

MARY ANNE REIMANN,
Assistant United States Attorney,
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Attorneys for Appellee.

District Court of the United States,
District of Arizona

No. Civ-452—Pct.

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

For their amended claim and cause of action, plaintiffs allege:

1. Plaintiffs are husband and wife and are residents and citizens of Mohave County, Arizona. Jurisdiction of this matter arises under the Federal Tort Claims Act, Title 28, Chapter 85, Section 1346 (b), United States Code Annotated.

2. At all times herein mentioned the defendant, by and through the United States Air Force, was engaged in military operations, which said operations included the driving and operating of motor vehicles by United States Air Force personnel in and near Kingman, Arizona.

3. On or about June 24, 1955, at or near the intersection of Topeka Street and South Fifth Avenue, Kingman, Arizona, Francis Maka, a member of the United States Air Force, while acting within the course and scope of his office or employment and

acting in the line of his duty with the United States Air Force, was driving a truck belonging to the defendant in an easterly direction on said Topeka Street, Kingman, Arizona.

4. At said time and place, Francis Maka, as agent and servant of defendant aforesaid carelessly, recklessly and negligently drove and operated defendant's truck so as to cause the same to collide with a 1949 Lincoln sedan in which plaintiff, Amanda Ferguson, was a passenger.

5. As a direct and proximate result of the aforesaid careless, reckless, and negligent operation of defendant's said truck, plaintiff Amanda Ferguson was sorely and severely injured in that she received lacerations on the head, scalp, left arm and right arm, bruises and contusions of the knees and legs, injury to the left shoulder girdle and an injury to the brain; all of said injuries have precipitated, caused, or aggravated hypertensive cardiovascular disease; all of said injuries and their effects have caused plaintiff severe distress, headaches and sleeplessness; she has been made sick, sore, lame and disabled; all of said injuries and their effects have made plaintiff, Amanda Ferguson, extremely nervous and said injuries were exceedingly painful and will be painful in the future; due to said injuries plaintiff Amanda Ferguson required hospital, X-ray and medical care, the amount of which is not now presently known, and plaintiffs will seek leave of the court to amend when such amounts are ascertained. Said injuries left permanent disfiguring scars on

plaintiff Amanda Ferguson; said injuries and their effects have caused plaintiff Amanda Ferguson to lose time from her occupation and employment as a cook, wherein she was prior to the accident earning \$60.00 per week, and in addition said injuries and their effects have permanently impaired plaintiff Amanda Ferguson's capacity to earn a livelihood. Said injuries and their effects are permanent in nature and will require future medical treatment and care—all to plaintiff's damage in the sum of \$40,000.00.

Wherefore, plaintiffs pray judgment against defendant in the sum of \$40,000.00 together with costs of suit.

MOORE & ROMLEY,

By /s/ JOHN H. KILLINGSWORTH,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT UNITED
STATES OF AMERICA

Comes Now the defendant, United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Robert O. Royston, Assistant U. S. Attorney, and for its answer to the Complaint of the Plaintiffs on file herein, admits, denies and alleges as follows:

I.

The defendant admits the allegations contained in Paragraphs 1, 2 and 3 of the Plaintiffs' Complaint;

II.

Defendant admits that on June 24, 1955, a collision occurred between the automobile in which plaintiff Amanda Ferguson was a passenger and defendant's truck, but denies each and every other allegation contained in Paragraph 4 of Plaintiffs' Complaint;

III.

The defendant denies the allegations contained in Paragraph 5 of the Plaintiffs' Complaint;

Wherefore, the defendant, United States of America, demands that the plaintiffs take nothing by their Complaint and that the Complaint be dismissed, for its costs herein incurred, and for such other and further relief as the Court may deem just.

JACK D. H. HAYS,

United States Attorney

For the District of Arizona;

/s/ ROBERT O. ROYLSTON,

Assistant U. S. Attorney, Attorneys for defendant
U. S. A.

Affidavit of mail attached.

[Endorsed]: Filed November 22, 1955.

[Title of District Court and Cause.]

INTERROGATORIES TO PLAINTIFFS

Comes Now the defendant, The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Mary Anne Reimann, Assistant U. S. Attorney, and requests the plaintiffs to answer the following interrogatories, in accordance with Rule 33, Federal Rules of Civil Procedure:

1. Give the names and addresses of all doctors who have treated Amanda Ferguson for injuries received from the accident of June 24, 1955;
2. As a result of the accident of June 24, 1955, state in detail the injuries Amanda Ferguson received at the time of the accident;
3. State in detail what injuries, if any, Amanda Ferguson has today as a result of the said accident;
4. List individually all medical expenses and other special damages incurred by Amanda Ferguson as the result of the said accident of June 24, 1955;
5. List the present addresses of Edward A. Ferguson and Amanda Ferguson.

Defendant The United States of America hereby demands that plaintiffs answer the foregoing interrogatories under oath, as prescribed by Federal

Rules of Civil Procedure within fifteen (15) days from the date of service of said Interrogatories.

JACK D. H. HAYS,

United States Attorney

For the District of Arizona;

/s/ MARY ANNE REIMANN,

Assistant U. S. Attorney, Attorneys for defendant
U. S. A.

Affidavit of service by mail attached.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO
INTERROGATORIES

State of Arizona,
County of Mohave—ss.

Edward A. Ferguson and Amanda Ferguson, husband and wife, being first duly sworn upon oath do hereby answer the interrogatories filed by the United States of America in the above-entitled matter as follows:

1. Plaintiff Amanda Ferguson was examined by Arthur A. Arnold, M.D., Medical Building, Kingman, Arizona; Walter Brazie, M.D., Kingman, Arizona; she was examined once by John A. Westfall, M.D., Lois Grunow Clinic, Phoenix, Arizona; and she was examined once by John A. Eisenbeiss, M.D., Lois Grunow Memorial Clinic, Phoenix, Arizona.

2. As a result of the accident of June 24, 1955, plaintiff Amanda Ferguson received the following injuries: moderate concussion, laceration of the scalp, contusion of the right hip, multiple bruises, severe headaches, disturbed vision, dizziness and loss of memory. Said injuries and the shock accompanying same were a precipitating factor in bringing about or aggravating hypertensive cardiovascular disease to the extent that the plaintiff, Amanda Ferguson, cannot now carry on her occupation as a cook which she performed for approximately five years prior to the accident.

3. Plaintiff Amanda Ferguson as a result of said injuries has the following complaints: headaches, disturbed vision, dizziness, loss of memory, weakness, nervousness and hypertensive cardiovascular disease.

4. Medical expenses incurred by plaintiff Amanda Ferguson as a result of the accident of June 24, 1955, are as follows:

Mohave General Hospital	\$ 68.90
Lois Grunow Memorial Clinic (X-ray)	25.00
Walter Brazie, M.D.	44.00
Arthur A. Arnold, M.D.	50.00
John Eisenbeiss, M.D.	25.00
John F. Westfall, M.D.	15.00
	<hr/>
	\$227.90

In addition plaintiffs have incurred expenses for drugs and prescriptions, the exact amount of which is not at present known.

In addition plaintiff Amanda Ferguson has been unable to work since the accident of June 24, 1955, to date for a loss of forty-three weeks' work at \$66.00 per week in the total sum of \$2,838.00 to date.

In addition plaintiff is advised that she will never again be able to return to a gainful occupation and therefore will have future loss of earnings consistent with her life expectancy.

5. The present address of Edward A. Ferguson and Amanda Ferguson is 430 Gold Road Avenue, Kingman, Arizona.

/s/ EDWARD A. FERGUSON;

/s/ AMANDA FERGUSON.

Subscribed and sworn to before me this 12th day of April, 1956.

[Seal] /s/ NELLIE E. SMITH,
Notary Public.

My Commission expires: 6-2-59.

Affidavit of mail attached.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Pursuant to Rule 36(a), Federal Rules of Civil Procedure, plaintiffs request defendant to admit the

truth of the following matters of fact within ten days after service of this request:

1. On June 24, 1955:

(a) Topeka Street in Kingman, Arizona, at and near the place of the collision in question consisted of pavement 35 feet wide;

(b) Adjoining Topeka Street on the North was a dirt shoulder, 14 feet wide;

(c) Adjoining Topeka Street on the South was a dirt shoulder, 12 feet wide;

(d) The area along Topeka Street, west of its intersection with South 5th Street for a distance of at least 600 feet, is a residence district.

2. Prior to and at the time of the collision which is the subject matter of the above-entitled action:

(a) Plaintiff Amanda Ferguson was sitting as a passenger in an automobile operated by Estella Christine Hopkins;

(b) The Hopkins' automobile was parked, parallel to Topeka Street, facing in a westerly direction, and on the southerly dirt shoulder;

(c) No portion of the Hopkins' automobile was on the pavement of Topeka Street;

(d) Adjoining the Hopkins' automobile to the west was an automobile operated by Mabel E. Redding;

(e) The Redding automobile was parked parallel to Topeka Street, facing in an easterly direction and on the southerly dirt shoulder;

(f) No portion of the Redding automobile was on the paved portion of Topeka Street;

(g) The rear end of the Hopkins' automobile was approximately 28 feet west of the west edge of South 5th Street;

(h) The front end of the Redding automobile was approximately 50 feet west of the west edge of South 5th Street.

3. Immediately prior to the collision in question Francis T. Maka was driving a United States Air Force truck in an easterly direction along Topeka Street:

(a) At a speed in excess of 35 miles per hour;

(b) At a speed which prevented him from controlling the movement of said truck;

(c) Without keeping any lookout for other vehicles parked on the dirt shoulder adjoining Topeka Street to the south;

(d) Without keeping said truck under control so as to prevent it from leaving the paved portion of Topeka Street.

4. The United States Air Force truck above mentioned:

(a) Was in good mechanical condition and contained no defects;

(b) Ran off the paved portion of Topeka Street and collided with the left side of the Redding automobile, shoving it 23 feet in a southeasterly direction;

(c) Continued on and ran into and upon the right front and hood of the Hopkins' automobile, shoving it 54 feet in an easterly direction;

(d) Continued on for approximately 55 feet and turned over on its left side.

5. Francis T. Maka was cited by the Kingman police, and subsequently pleaded guilty to the charge, for reckless driving at the time of the collision in question.

6. Plaintiff Amanda Ferguson could not have avoided the collision in question.

7. The collision in question was caused solely by the careless and negligent operation of the United States Air Force truck by Francis T. Maka.

MOORE & ROMLEY;

By /s/ JARRIL F. KAPLAN,
Attorneys for Plaintiffs.

Affidavit of mail attached.

[Endorsed]: Filed June 18, 1956.

[Title of District Court and Cause.]

**DEFENDANT'S ANSWERS TO REQUEST
FOR ADMISSIONS**

Comes Now Mary Anne Reimann, Assistant United States Attorney, on behalf of the defendant, United States of America, and makes the following

opinion and a conclusion of defendant upon matters to be determined in the trial of the case.

JACK D. H. HAYS,

United States Attorney

For the District of Arizona;

/s/ MARY ANNE REIMANN,

Assistant U. S. Attorney,

Attorneys for Defendant.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed June 26, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF JULY 6, 1956

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly for trial this day. Jarril F. Kaplan, Esq., is present for the plaintiffs. Mary Anne Reimann, Esq., Assistant United States Attorney, is present for the defendant.

Both sides announce ready for trial.

It Is Ordered that the plaintiff's Motion for Leave to File Amended Complaint is granted, which Amended Complaint is now endorsed filed.

Counsel for the Government admits the Government's liability. Counsel stipulate issues to be tried

are the extent of damages and injuries sustained by plaintiff Amanda C. Ferguson.

Plaintiffs' Case:

Amanda C. Ferguson is sworn and examined in plaintiffs' behalf.

The following plaintiffs' exhibits are admitted in evidence:

1. Photostat of Hospital Records;
2. Photostat of Hospital records;
3. Group of drug, medical and hospital bills.

The following witnesses are sworn and examined in the plaintiffs' behalf:

Clara Osterman;
Estelle C. Hopkins;
Walter Brazil.

At 12:00 o'clock noon, It Is Ordered that the further trial of this case is continued to 1:30 o'clock p.m., this date, to which time, the parties and counsel are excused.

Subsequently, at 1:30 o'clock p.m., the parties and all counsel being present, pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Dr. John Finley Westfall is sworn and examined in the plaintiffs' behalf.

The Following plaintiffs' exhibits are admitted in evidence:

4. Photograph;

Ferguson was sitting. The government admits that it is liable for the injuries and damages sustained by Mr. and Mrs. Ferguson.

Prior to and at the time of the collision Mrs. Ferguson was a woman in apparent good health. She had twelve children and many grandchildren. She had worked five steady years as a cook in a cafe, earning \$66.00 per week (\$3,432.00 per year). She had some high blood pressure, but it was entirely non-symptomatic and non-disabling. She had never been troubled by nervousness, faulty memory, general weakness, dizziness, disturbed vision or severe headaches. She visited easily with her children and grandchildren, performed all her own housework and, in addition, she was the sole means of support for herself and her husband.

The force of the impact to which Mrs. Ferguson was subjected is clearly demonstrated by the photographs in evidence. The hospital records show that Mrs. Ferguson received a cerebral concussion, a laceration over the right eye, lacerations of the right arm and injury to the shoulder and bruises of both knees. She was hospitalized for two days and was then allowed to go home. She remained home for approximately one week and then attempted to return to her former employment. She remained on the job for four weeks, but only because her daughter was there to help her. She was very weak; her memory failed her; she had severe headaches and dizziness. After four weeks she could continue no

longer and was forced to give up in her attempt to work.

At this time, approximately five weeks after the accident, her vision became blurred; she became nauseous; she lost her sense of direction; she became extremely nervous; and her headaches were intractable. She was re-hospitalized for four days. But her symptoms continued. She was sent to Phoenix to be examined by Dr. John Eisenbeiss, a specialist in neurosurgery. Dr. Eisenbeiss made no positive neurological findings and sent her to Dr. John F. Westfall, a specialist in internal medicine. Upon examination Dr. Westfall determined that Mrs. Ferguson's symptoms were caused by an aggravation of her pre-existing, dormant, hypertensive heart and placed her on drugs to reduce her blood pressure.

Her condition from September 26, 1955, to the time of the trial was closely observed by Dr. Walter Brazie who had previously been Mrs. Ferguson's family physician. Dr. Brazie has seen Mrs. Ferguson for every two weeks for the last ten months. He has used all of the various drugs, and combinations thereof, available for the reduction and control of her blood pressure, without success. He has been unable to make her condition non-symptomatic. At the present time Mrs. Ferguson continues to be extremely nervous and to be troubled with faulty memory and general weakness. She can only perform light household duties.

It is the unqualified opinion of both Dr. Brazie and Dr. Westfall that the accident and resultant in-

juries aggravated Mrs. Ferguson's pre-existing hypertensive heart disease and precipitated her present condition, which is disabling. There was no testimony to the contrary. While the doctors both acknowledge the possibility that her present condition might have come on even though she had not been in an accident, they unhesitatingly testified under examination by the court, that it probably would not have so occurred.

It is the unqualified opinion of both Dr. Brazie and Dr. Westfall that Mrs. Ferguson's condition has now become stationary and that she will never again be able to return to a gainful occupation. This testimony was likewise uncontradicted. True, Dr. Born testified that by the use of new drugs Mrs. Ferguson's blood pressure might be controlled at a certain level, and that if it was controlled so as to produce no symptoms, she could then return to work. The effect of Dr. Born's testimony in this regard was merely to acknowledge a possibility; the law regards this as insufficient medical proof. *Hartford Acc. Etc., Co. vs. Industrial Com.*, 38 Ariz. 307, 299 Pac. 1026. Furthermore, when pressed to be more certain, Dr. Born testified that he did not know whether or not Mrs. Ferguson's blood pressure could ever be controlled or her condition rendered non-symptomatic.

“The general rule seems to be that where the result of the accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the defendant is

liable for the entire damages which ensue, for it cannot be said that the development of the disease as a result of the injury was not the consequence which might naturally or ordinarily follow as a result of the injury, and therefore, the negligent person may be held liable therefor. In other words, if a latent condition itself does not cause pain, suffering, etc., but that condition plus an injury caused such pain, the injury, and not the latent condition, is the proximate cause."

15 AM. Jur. Damages, Sec. 81, p. 490.

The fact that Mrs. Ferguson had a weak or diseased heart does not relieve the government from liability for all the damages she has sustained because the uncontradicted testimony established that the accident and consequent injuries had the effect of aggravating such disease and permanently incapacitating her from performing the work she had been doing for the past five years. She is entitled to damages for the full amount of her disability as though it had been produced originally and directly by the injury. *Hartford Acc. etc., vs. Industrial Com.*, 38 Ariz. 307, 299 Pac. 1026, *supra*; *United States v. Fotopulos* (C.A. 9), 180 Fed. (2nd) 631.

To the time of trial, Mr. and Mrs. Ferguson had incurred \$288.90 in medical, hospital and drug expenses, and Mrs. Ferguson had been deprived of \$3,300.00 in earnings. The court has awarded judgment in the sum of \$10,288.90. Thus, only \$6,700.00 (less than two years' earnings) has been awarded for loss of future earnings, pain and suffering to the

time of the trial and pain and suffering to be endured in the future.

Mrs. Ferguson is a woman fifty-five years of age with a life expectancy, according to the American Experience Table of Mortality, of 17.40 years.

The present value of \$3,432.00 per year for seventeen years, invested at 3%, is \$45,186.06. At 3½%, it is \$43,419.26. At 4%, it is \$41,752.68. At 4½%, it is \$40,179.11. The very least to which Mrs. Ferguson is reasonably entitled for loss of future earnings is one-half of one of these sums—a minimum of \$20,000.00. In addition, she is entitled to a reasonable sum for the permanent facial scar she bears, the pain and suffering she has endured up to the time of trial, and the pain and suffering she will endure for the remainder of her lifetime.

At the trial the court examined the plaintiff and Drs. Brazie and Westfall who were called to testify in her behalf. The court also questioned Dr. Born who examined the plaintiff on behalf of the government and was called and qualified by the government as an expert witness in its case. The court undoubtedly has the right to examine and cross-examine witnesses. *Tom Reed Gold Mines Co. vs. Brady*, 55 Ariz. 133, 99 Pac. (2d) 97. It was evident from the questions asked that the court had some ideas of its own with regard to the injuries sustained and the damages claimed by the plaintiffs in this case, and that it was seeking by the examination to confirm or dispel its ideas. This is understandable, particularly

since the injury was one related to the heart and the effect of the accident thereon, a subject concerning which a lay person has little knowledge as compared to the medical expert.

But the court's examination served only to confirm that the accident had aggravated Mrs. Ferguson's pre-existing condition and permanently disabled her from engaging in a gainful occupation. Although the court as yet has made no findings of fact, it would appear from the examination made by the court as aforesaid and the fact that the judgment awarded the plaintiff only \$6,700.00 over and above the special damages incurred to date, that the court concluded that Mrs. Ferguson was not permanently disabled or incapacitated from performing her work. If the court did so conclude, it was in error. *Hewett vs. Industrial Commission*, 72 Ariz. 203, 232 Pac. (2d) 850, the Arizona Supreme Court held that the cause of a human being's death, when not patently discernible by a layman, must be left exclusively to medical experts. The same principle, we submit, applies to the cause of disability resulting from heart disease. The rule is well stated in *Guarantee Ins. Co. vs. Industrial Acc. Commission* (Cal.), 199 Pac. (2d) 12, at page 15, as follows:

“* * * when the diagnosis of a physical condition depends essentially upon the knowledge, skill and experience of medical expert witnesses, and is not within the common knowledge of non-expert laymen, the evidence of such medical experts is conclusive upon that issue.”

In *Hammond vs. A. J. Bayless Markets, Inc.*, 58 Ariz. 58, 65, 117 Pac. (2d) 490, the Arizona Supreme Court held that:

“In actions for an attorney’s fees, while expert testimony as to the value of such service is admissible, and should be given due weight, it is not conclusive on the court, for the latter is itself an expert on that question and may consider its own knowledge and experience in determining a reasonable and proper fee, and in the light of such knowledge may form an independent judgment and determine the reasonable compensation to be allowed.”

The language we have underscored in the foregoing quotation states the reason for the rule, namely: the court “is itself an expert” on the question of attorney’s fees. It is not an expert on the medical question involved in this case.

Since there was no conflict in the evidence with regard to the cause of Mrs. Ferguson’s disability and its permanency, the court may not substitute its lay opinion on the question for the opinion of the experts. Compare: *Kinney vs. Sacramento City Employees’ Retirement Sys.* (Cal.), 176 Pac. (2d) 775. We therefore urge the court to reconsider the evidence in this case, and upon such reconsideration to open the judgment and increase the same to an amount which will fairly and adequately compensate the plaintiffs for the damages which they have sustained.

Respectfully submitted,

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,
Attorneys for Plaintiffs.

Affidavit of mail attached.

[Endorsed]: Filed July 12, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF JULY 13, 1956

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that counsel for the plaintiffs prepare, serve and lodge proposed findings of fact and conclusions of law in this case in accordance with the local court rules. Such findings of fact shall include inter alia, finding that the injuries sustained by plaintiff Amanda Ferguson in the collision involved in this case proximately caused said plaintiff's temporary total disability with the following consequent damages: loss of earnings \$3,000.00; loss of earning power \$6,000.00; pain and suffering \$1,000.00; medical and hospital expenses \$288.90.

In the District Court of the United States for the
District of Arizona

No. Civ.-452-Pet.

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial and the Court, having duly considered the evidence and being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiffs bring this action to recover damages for personal injuries inflicted by a member of the United States Air Force pursuant to the Federal Tort Claims Act, Aug. 1, 1947, ch. 446, 61 Stat. 722 (28 U.S.C.A., Secs. 1346, 1402, 2402, 2411, 2412, 2674-2676).

2. On June 26, 1955, plaintiff Amanda Ferguson was sitting as a passenger in an automobile. The automobile was parked entirely off the paved portion of Topeka Street in Kingman, Arizona. While she was sitting there, a truck belonging to the

United States Air Force and driven by a member thereof along Topeka Street, ran off the roadway and into the parked automobile.

3. The government admits liability for the collision and the injuries and damages caused thereby.

4. As a proximate result of the collision plaintiff Amanda Ferguson received a cerebral concussion, a laceration above the right eyebrow, lacerations on the right arm and an injury to the left shoulder. As a further proximate result of the collision the laceration above the right eyebrow has left a permanent scar and Amanda Ferguson's pre-existing hypertensive heart condition was aggravated to the extent that it caused temporary total disability.

5 Plaintiffs have consequently been damaged in the total sum of \$10,288.90, as follows:

- (a) Loss of earnings—\$3,000.00.
- (b) Loss of earning power—\$6,000.00.
- (c) Pain and suffering—\$1,000.00.
- (d) Medical and hospital damages—\$288.90.

Conclusions of Law

I.

Defendant is liable to the plaintiffs for all damages proximately caused by the collision which occurred June 26, 1955.

II.

Defendant is liable to plaintiffs in the sum of \$10,288.90.

Dated this 19th day of July, 1956.

/s/ JAMES A. WALSH,
District Judge.

Affidavit of service by mail attached.

Proposed Findings: [Endorsed]: Filed July 17, 1956.

[Endorsed]: Filed July 19, 1956.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT

Pursuant to Rule 52(b) Federal Rules of Civil Procedure, 28 U.S.C.A., plaintiffs above named respectfully move the Court to amend the findings of fact heretofore settled, approved and signed by:

1. Deleting from the fourth paragraph thereof the words "temporary total disability" and inserting in lieu thereof the words "permanent total disability," and

2. By increasing the amount of the judgment to a sum which will fairly and adequately compensate the plaintiffs in accordance with a finding of permanent total disability.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,
Attorneys for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed July 26, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF AUGUST 13, 1956

Honorable James A. Walsh, United States District Judge, Presiding.

The Plaintiffs' Motion to Alter and Amend Judgment or in the Alternative for a New Trial and Motion to Amend Findings of Fact come on for hearing this day.

Jarril Kaplan, Esq., appears on behalf of plaintiffs. Robert O. Royston, Esq., Assistant United States Attorney, is present for the defendant.

Said motions are now duly argued by respective counsel.

It Is Ordered that Motion to Alter and Amend Judgment or in the Alternative for a New Trial and Motion to Amend Findings of Fact are each and all denied.

(Docketed August 13, 1956.)

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Edward A. Ferguson and Amanda Ferguson, plaintiffs in the above-entitled action, appeal to the United States Court of Appeals, Ninth Circuit, from the judgment entered in said action on July 9, 1956, from the order of August 13, 1956, denying the plaintiffs' motion to alter or amend judgment, or in the alternative,

for a new trial, and from the order of August 13, 1956, denying plaintiffs' motion to amend findings of fact.

Dated this 21st day of August, 1956.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That Edward A. Ferguson and Amanda Ferguson, husband and wife, as principals, and Anchor Casualty Company, as surety, are held and firmly bound, jointly and severally, unto The United States of America, defendant and appellee in the above-entitled cause, in the penal sum of Two Hundred Fifty Dollars (\$250.00) lawful money of the United States of America to be paid to the above-named appellee, for the payment of which sum well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents:

Sealed with our seals and dated this 21st day of August, 1956.

The condition of the above obligation is such that,

Whereas, the above-entitled court on July 9, 1956, rendered judgment herein in favor of plaintiffs and

against defendant, and on August 13, 1956, made and entered herein an order denying the motion of plaintiffs to alter or amend the judgment, or in the alternative, for a new trial, and on August 13, 1956, made and entered herein an order denying the motion of plaintiffs to amend the findings of fact, and plaintiffs Edward A. Ferguson and Amanda Ferguson having this day given written notice of appeal to The United States Court of Appeals, Ninth Circuit, from said judgment and orders;

Now Therefore, if plaintiffs Edward A. Ferguson and Amanda Ferguson shall prosecute their appeal to effect and shall well and truly pay the costs if the said appeal is dismissed, or the said judgment and orders affirmed, or such costs as The United States Court of Appeals, Ninth Circuit, may award if said judgment and orders are modified, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation shall be null and void; otherwise to be and remain in full force and effect.

EDWARD A. FERGUSON and
AMANDA FERGUSON,

By /s/ JARRIL F. KAPLAN,
Their Attorneys.

[Seal] ANCHOR CASUALTY
COMPANY,

By /s/ HUGH S. SUGGS,
Its Attorney in Fact.

[Endorsed]: Filed August 21, 1956.

In the District Court of the United States for the
District of Arizona

No. Civil 452

EDWARD A. FERGUSON and AMANDA F.
FERGUSON,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

MOORE & ROMLEY, By
JARRIL F. KAPLAN,
For the Plaintiffs.

MARY ANNE REIMANN,
Assistant United States Attorney,
For the Defendant.

The above-entitled case came up for trial on the 6th day of July, 1956, at Prescott, Arizona, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

The Clerk: Civil 452-Prescott, Edward A. Ferguson and Amanda Ferguson, husband and wife, plaintiffs, versus The United States of America, defendant.

Mr. Kaplan: The plaintiffs are ready, your Honor.

Miss Reimann: The government is ready, your Honor.

The Court: For the record perhaps there should be an order granting the plaintiffs leave to file the amended complaint which is endorsed as filed in this cause on June 18, 1956.

Mr. Kaplan: Thank you, your Honor.

The Court: I understand counsel have some agreement as to the question of liability in this case?

Miss Reimann: That is correct, your Honor. The Government will admit the liability in the case.

The Court: So that the issue will be the matter of injuries and damages, is that right?

Mr. Kaplan: That is right.

The Court: Very well, you may proceed.

Mr. Kaplan: Call Mrs. Amanda Ferguson.

Your Honor, before I begin the interrogation of this witness, I have under subpoena and present in the courtroom Mr. Dale H. May, who was to have been a witness on the question of liability. I wonder if it would not be in order at this time to request the Court to excuse the witness from the subpoena and allow him to return to his home?

The Court: Mr. May, you will be excused, sir. You will not need to attend any further.

AMANDA FERGUSON

called as a witness herein, having been first duly sworn, testified as follows: [2*]

Direct Examination

By Mr. Kaplan:

Q. Will you state your name, please?

A. Amanda Ferguson.

Q. Where do you live, Mrs. Ferguson?

A. 430 Goldroad Avenue, Kingman, Arizona.

Q. You reside at that address with your husband? A. Yes.

Q. What is his name?

A. Edward Ferguson.

Q. How long have you live in Kingman, Arizona? A. About six years.

Q. How long have you lived in Arizona, just approximately? A. About thirty years.

Q. Mrs. Ferguson, you were involved in an automobile accident on June 24 of 1955, is that correct? A. Yes.

Q. That accident occurred in the City of Kingman, Arizona? A. Yes.

Q. At the time of the accident, Mrs. Ferguson, I believe you were a passenger in an automobile, is that correct? A. Yes.

Q. And will you state just briefly what happened. The Government has admitted liability so we are not interested in establishing fault, but so the Court will get a background of [3] what hap-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Amanda Ferguson.)

pened to you in the accident, will you tell the Court briefly what occurred?

A. Well, my daughter and I had stopped at a residence, we had some business to attend to. We stayed in the house about five minutes and came out and got into the car. Just after we got into the car we saw a truck coming, an Air Force truck, and about half a block away I noticed he left the street and was driving over by the curb; and I thought probably he was going to stop, but he didn't stop and he hit a car that was parked in front of us and hit us.

Q. Mrs. Ferguson, will you please tell the Court what happened to you after the truck ran into your car?

A. Well, I had an injury over my right eye and——

Q. Did you remain in the seat of the car?

A. Yes, I did, until the ambulance came.

Q. You were not thrown from the seat?

A. No.

Q. All right. Will you go ahead and tell the Court then what injuries you received in the accident?

A. A cut over the right eye.

Q. In that connection, Mrs. Ferguson, I believe you still have the scar over your right eye?

A. Yes.

Q. From that cut? A. Yes. [4]

Q. It is readily visible? A. Yes.

Q. Go ahead, Mrs. Ferguson.

A. Cuts on the arm and bruises.

(Testimony of Amanda Ferguson.)

Q. Which arm did you receive cuts on?

A. Right arm.

Q. And where were the bruises?

A. Both of my knees were bruised and my right leg.

Q. And after the ambulance arrived where were you taken, Mrs. Ferguson?

A. To the Mohave General Hospital.

Q. What doctor attended you at the hospital?

A. Dr. Arthur Arnold.

Q. What did Dr. Arnold do for you when you arrived at the hospital?

A. He didn't get there for almost thirty minutes. When he got there he put several stitches in this cut over my eye and had the nurses put me to bed.

Q. How long did you remain in the Mohave General Hospital? A. Two days.

Q. And then you were released? A. Yes.

Q. And after you were released from the hospital what did you do, Mrs. Ferguson?

A. Well, I stayed in bed for a few days. Then after a [5] week I went back to work.

Q. Mrs. Ferguson, you seem to be having some trouble with your memory. Has that existed since the accident? A. Yes.

Q. Mrs. Ferguson, prior to this accident were you employed? A. Yes.

Q. By whom? A. Mrs. Clara Osterman.

Q. Where? A. At the Casa Linda Cafe.

Q. At the Casa Linda Cafe in Kingman?

(Testimony of Amanda Ferguson.)

A. Yes.

Q. Your boss was Mrs. Clara Osterman?

A. Yes.

Q. What were your duties at the cafe?

A. I was cook.

Q. What did your duties as cook require you to do?

A. I brought up the dinner and made menus and ordered supplies, kept the supplies up; and also for about three hours at that time I worked on the grill.

Q. And also did you have to do any of the baking? A. Yes, I did the baking.

Q. Did your duties require that you be in good physical condition? A. Yes. [6]

Q. Did they require that you have a retentive memory? A. Yes.

Q. Will you explain to the Court why that was necessary?

A. Well, part of that time I had to take orders from the waitresses and then I had to check the supplies, keep supplies up.

Q. How about the menus, Mrs. Ferguson?

A. Help prepare the menus.

Q. Mrs. Ferguson, how long had you been employed by Mrs. Osterman at the Casa Linda Cafe as a cook and performing the duties you just described? A. Almost five years.

Q. During that period of time had you ever missed a day's work because of illness of any kind?

A. Very few.

(Testimony of Amanda Ferguson.)

Q. When did you miss those few days and what was the reason for it?

A. Well, when I missed, each time I missed it was on account of a cold, common cold or flu.

Q. How much did you earn at the cafe?

A. About \$66.00 a week.

Q. Mrs. Ferguson, your husband has not been employed for sometime, is that correct?

A. No, he hasn't.

Q. You were the sole money earner in the family at the [7] time of the accident.

A. Yes.

Q. Are you trained or educated to perform any other occupation for the purpose of earning a living?

A. No.

Q. In other words, when you have been occupied outside the home it has been as a cook or something of that nature?

A. Yes.

Q. Mrs. Ferguson, will you please tell the Court what the condition of your health was prior to this accident, so far as you know?

A. Well, it was fairly good.

Q. And prior to the accident had you ever been troubled with severe headaches?

A. Not—I wasn't bothered but very little with headaches.

Q. Have you ever been troubled with loss of memory?

A. No.

Q. Have you ever been troubled with dizziness or disturbed vision?

A. No.

Q. Had you ever been disturbed with a general

(Testimony of Amanda Ferguson.)

condition of weakness? A. No.

Q. I believe you have eleven children, all living and well? [8] A. Twelve.

Q. Twelve, excuse me. How old are you, Mrs. Ferguson?

A. Sixty-five—pardon me, fifty-five.

Q. Mrs. Ferguson, you say that after you were released from the hospital you remained at home for approximately a week, then you attempted to go back to work at the cafe, is that correct?

A. Yes.

Q. Will you please tell the Court what you found your physical condition to be when you tried to go back to work?

A. I had headaches constantly and I couldn't remember as I should and I was weak, I would get weak.

Q. Were you able to continue in your occupation as a cook? A. No.

Q. Have you ever returned since that one brief period of time after you were discharged from the hospital—— A. No.

Q. ——have you ever returned back to work?

A. No.

Q. Have you ever felt able to return back to work? A. No, I haven't.

Q. Mrs. Ferguson, after you tried to go back to work and found you were not able to perform your duties, did anything occur with regard to your physical condition? [9] A. Yes.

Q. Will you please tell the Court what that was?

(Testimony of Amanda Ferguson.)

A. Well, I suddenly—I had an attack and my vision wasn't right. I would look at objects, I couldn't see the whole object and I was dizzy.

Q. What did you find with regard to nervousness? A. I was very nervous.

Q. What happened at that time then, Mrs. Ferguson, when you received this attack of these symptoms? A. I was hospitalized again.

Q. By whom? A. By Dr. Arnold.

Q. Where were you hospitalized at that time?

A. Mohave General Hospital at Kingman.

Q. How long did you remain in the Mohave General Hospital at that time?

A. Four days.

Q. Was there any noticeable improvement in your condition when you were discharged from the hospital at that time?

A. A little. I still couldn't—my vision wasn't as it should be and I was weak.

Q. Did Dr. Arnold suggest that you see a specialist in Phoenix? A. Yes.

Q. Did you see a specialist in Phoenix? [10]

A. Yes.

Q. Whom did you first see in Phoenix?

A. Dr. Westfall.

Q. Did you see Dr. Westfall first, or did you see another doctor? A. No, Dr. Eisenbeiss.

Q. Dr. John Eisenbeiss? A. Yes.

Q. Who is a neuro surgeon? A. Yes.

Q. After Dr. John Eisenbeiss examined you he referred you to Dr. Westfall, is that correct?

(Testimony of Amanda Ferguson.)

A. Yes.

Q. You were referred to Dr. Westfall?

A. Yes.

Q. In Phoenix? A. Yes.

Q. Then you returned to your home in Kingman? A. Yes.

Q. I believe at the conclusion of Dr. Westfall's examination of you he gave you a prescription, is that right? A. Yes.

Q. I take it you wouldn't know the name of that prescription?

A. No, but I have the bottle with me. [11]

Q. Mrs. Ferguson, when you returned to Kingman did you continue to see Dr. Arnold?

A. Yes, I saw him for about once, I believe. I can't remember for sure. I don't believe I saw Dr. Arnold but once after that.

Q. Did you submit yourself to the care of another physician in Kingman? A. Yes.

Q. Who was that?

A. Dr. Walter Brazie.

Q. How often have you continued to see Dr. Brazie since the first time you went to see him?

A. Every two weeks.

Q. I believe you first saw Dr. Brazie around the latter part of September of last year, is that correct? A. Yes.

Q. For the injuries you received in this accident? A. Yes.

Q. You have continued to see Dr. Brazie every two weeks since that time? A. Yes.

Q. When was the last time you saw Dr. Brazie?

(Testimony of Amanda Ferguson.)

A. Tuesday.

Q. Tuesday of this week? A. Yes. [12]

Q. What has he done for you during these visits?

A. He has treated me for a nervous condition and hypertension.

Q. In what way?

A. He has given me medicine.

Q. Mrs. Ferguson, these symptoms which you described which first appeared after the accident, loss of memory, disturbed vision, headaches, dizziness, general feeling of weakness and nervousness, how long after the accident did they persist?

A. Several months.

Q. Do you still have any of those symptoms?

A. I am very nervous and still have the weakness and dizziness at times.

Q. How is your memory now as compared——

A. My memory is not good.

Mr. Kaplan: Your Honor, Plaintiffs' Exhibits 1 and 2 have been marked for identification; they are the photostats of the hospital records of the Mohave General Hospital in Kingman. We offer those exhibits in evidence.

Miss Reimann: No objection, your Honor.

The Court: They may be received.

(Plaintiffs' Exhibits 1 and 2 received in evidence.)

Q. (By Mr. Kaplan): Mrs. Ferguson, I hand you a group of bills which have been marked to-

(Testimony of Amanda Ferguson.)

gether as one exhibit, Plaintiffs' Exhibit 3 for identification. Will you please [13] review those bills and tell me whether they represent all of the actual hospital, medical and drug bills you have incurred as a result of the accident? A. Yes.

Q. Have you paid those bills?

A. Not all of them.

Mr. Kaplan: We offer Plaintiffs' Exhibit 3 in evidence.

Miss Reimann: I have no objection.

The Court: It may be received.

(Plaintiffs' Exhibit 3 received in evidence.)

Q. (By Mr. Kaplan): Mrs. Ferguson, since this accident have you at any time felt in good enough physical condition to return to your work?

A. No.

Q. You have a rather large family, and do many of them reside in Kingman?

A. Two daughters and three sons.

Q. Reside in Kingman? A. Yes.

Q. Do they in turn have children, are you a grandmother? A. Yes, I am.

Q. How often do you see your children and grandchildren? A. Oh, almost every day.

Q. And has that been true most of the years you have lived in Kingman? [14] A. Yes.

Q. Have you noticed any difference in your present demeanor and action when your children and grandchildren visit you now as compared to before the accident? A. Yes, I do.

(Testimony of Amanda Ferguson.)

Q. Will you please tell the Court as fully as you can what difference you notice in that regard?

A. I am so nervous that when too many of them get there at one time and get a little noisy I have to go to another room and get out of it.

Q. Had that condition ever existed prior to the accident? A. No.

Mr. Kaplan: You may cross-examine.

Cross-Examination

By Miss Reimann:

Q. Mrs. Ferguson, you say you live in Kingman. Do you live alone with your husband, or do any of the children live with you?

A. I have one son.

Q. How old is that son?

A. He is eighteen.

Q. Is he the youngest boy?

A. Yes, he is.

Q. He is your youngest child? [15]

A. Yes, that is correct.

Q. They range from 18 on up, all twelve of them? A. Yes.

Q. Does he work?

A. He does when he can get work. He goes to school.

Q. He is in high school in Kingman?

A. Yes.

Q. You stated there were two daughters and three sons, am I correct in that, that live in King-

(Testimony of Amanda Ferguson.)

man, too? I may be wrong, I may be misquoting it. I thought that is what you said?

A. Two married sons and the boy that is at home.

Q. And two daughters?

A. Two daughters, yes.

Q. The rest of your children live out of Kingman? A. Yes.

Q. Now, you stated that you had never done any type of work besides being a cook, and you had been a cook five years previous to the accident?

A. Yes.

Q. Had you ever cooked any place else?

A. Yes, I did a little while.

Q. Had you worked much before the five years?

A. About a year.

Q. Besides taking care of your children? [16]

A. No, I never did.

Q. That was the first time you ever did any work for somebody else? A. Yes.

Q. How large is the restaurant where you work? Was it a big one, does it seat a lot of people? It doesn't have to be exact.

A. I should know, but I can't remember just exactly.

Q. I didn't know whether it was a small one that you walked into or whether it had——

A. No, it is quite a nice cafe.

Q. Has quite a few tables in it?

A. Yes, about twenty chairs I believe at the counter.

(Testimony of Amanda Ferguson.)

Q. There are other people at work in the restaurant? A. Yes.

Q. Behind the counter besides you. Do you have assistant cooks? A. Yes.

Q. Does your daughter work there?

A. Yes.

Q. You stated you had done that for five years, I believe? A. Yes.

Q. When you went back to work it was a week after the accident, and how long did you work then? A. I worked about four weeks. [17]

Q. About four weeks? A. Yes.

Q. It was after that you quit and haven't returned? A. Yes.

Q. I believe you stated you were paid \$66.00 a week, is that correct? A. Yes.

Q. Was that your take home pay?

Mr. Kaplan: If your Honor please, I object to that as immaterial.

Miss Reimann: Your Honor, I have to claim surprise. They list the amount as \$60.00 in the complaint.

Mr. Kaplan: I appreciate that, your Honor, and there is a good explanation for it which Miss Reimann will get if she inquires sufficiently on cross-examination, but the question asked her was what her take home pay was. I don't think that is material. The question is what was she earning?

The Court: That is correct. However, I take it counsel is trying to get at an explanation for the difference.

(Testimony of Amanda Ferguson.)

Mr. Kaplan: I have no objection if she wants to ask that question.

Q. (By Miss Reimann): You stated you got \$66.00 a week. Now, was that all salary that was paid to you or how did you arrive at the \$66.00 a week? Did you get \$66.00 in cash?

A. I believe a dollar a day of that was for meals. [18]

Q. Was for meals? A. Yes.

Q. Actually the amount paid to you was \$60.00, is that correct? A. Yes.

Q. Now, at the time of the accident you stated that Dr. Arnold treated you in the hospital?

A. Yes.

Q. And you had gone to him before the accident on various occasions, is that correct?

A. I had a few times.

Q. And he treated you while you were in the hospital the first time after that and then he is the doctor that put you back in the hospital again?

A. Yes.

Q. Isn't it true that you went to him some after that? The last time you went to Dr. Arnold wasn't it March 26th, 1956?

A. The last time I went to Dr. Arnold was to get a report.

Q. And do you recall that was March 26th or in March, 1956? A. I can't recall exactly.

Q. At that time did he take your blood pressure? A. He did. [19]

(Testimony of Amanda Ferguson.)

Q. At that same time you were going to Dr. Brazie, is that correct? A. Yes.

Q. Previous to the accident, Mrs. Ferguson, you had knowledge that you had had high blood pressure or hypertension, you had been treated for that before? A. I had a little.

Q. You had gone to Dr. Arnold for that, hadn't you? A. No.

Q. At sometime he had taken your blood pressure, do you recall that?

A. I don't know of any time he took my blood pressure except that time, if it was in March the last time I went to him.

Q. You don't recall his taking your blood pressure in March of 1952? A. No.

Q. I believe at that time you were going to him for some gall bladder trouble, do you recall that?

A. I don't recall that.

Q. At that time you don't recall he took your blood pressure? A. No, I don't.

Q. You did know you had high blood pressure prior to the accident? [20] A. Yes.

Q. Who did you go to for treatment for that?

A. Dr. Brazie.

Q. Dr. Brazie. He treated you for high blood pressure prior to the accident?

A. Yes, he did.

Q. Did they ever give you any figure as to what the blood pressure was?

A. Yes. At that time it was 180.

Q. Over what? A. Over——

(Testimony of Amanda Ferguson.)

Q. If you recall. A. 130, I believe.

Q. And you were working at that time?

A. Yes.

Q. And the high blood pressure at that time didn't bother you or keep you from working?

A. No.

Q. You had no signs of dizziness at that time?

A. No.

Q. Now, you stated that Dr. Arnold sent you to Dr. Eisenbeiss? A. Yes.

Q. Did he examine you? A. Yes. [21]

Q. And he sent you then to Dr. Westfall?

A. Yes.

Q. Did Dr. Eisenbeiss recommend you have an electro-encephalograph? A. Yes.

Q. Did you ever have that?

Mr. Kaplan: Do you know what it is, Mrs. Ferguson?

The Witness: I am not sure that I do.

Q. (By Miss Reimann): You don't know whether you had that test run or not then?

A. I had—I can't remember the word.

Q. Did he run the test on you, Dr. Eisenbeiss?

A. I believe that Dr. Westfall did.

Q. Did Dr. Arnold ever advise you against returning to work? A. No.

Q. How much do you weigh now, Mrs. Ferguson? I hate to be personal in this.

A. 170.

Q. And is that about your normal weight, have

(Testimony of Amanda Ferguson.)

you weighed about the same thing for a number of years? A. Yes.

Q. You haven't gained much or lost in the last five or six years?

A. I did lose some when I was feeling so bad.

Q. How much did you weigh prior to the accident? A. About the same.

Q. About 170 pounds? A. Yes.

Q. Do you know how tall you are?

A. Five feet four and three-quarters, I believe.

Q. Now, I believe you stated after you went to the hospital the second time you had some relief after that and you felt a little better, after your second trip to the hospital, is that correct?

A. Yes, I felt a little better.

Q. Have you remained feeling a little better since that time?

A. Well, I have been up and down.

Q. Do you think, Mrs. Ferguson, possibly you returned to work too soon after the accident?

Mr. Kaplan: I object to that as immaterial, if the Court please.

The Court: The objection will be sustained.

Q. (By Miss Reimann): Now, you are able to get around by yourself, you don't have to have any help to do that? A. Yes.

Q. Do you do your housework at home now?

A. Part of it.

Q. Who does the rest of it? [23]

A. My husband.

(Testimony of Amanda Ferguson.)

Q. By housework, do you do your own cooking? A. Yes.

Q. Making of the beds, things like that?

A. I do my cooking and making of the beds, and that is about all.

Q. Do you go downtown by yourself and do your grocery shopping? A. Yes.

Q. Do you walk or do you have a car?

A. We have a car.

Q. Do you drive the car?

A. My daughter usually takes me, one or the other of them.

Q. Do you drive a car yourself?

A. No, ma'am.

Q. Did you used to drive a car?

A. I did.

Q. You don't drive it at all now? A. No.

Q. Have you driven the car since the accident?

A. No.

Q. Never at all? A. No.

Q. But you have walked by yourself downtown, is that right? [24] A. A couple of times.

Q. You stated you worked four weeks after the accident. You went back to work a week after the accident, then you worked for four weeks at that time? A. Yes.

Q. Are you able to read today, the newspaper?

A. Yes.

Q. The first time that you went to Dr. Brazie was in September of '55, is that correct?

A. About then.

(Testimony of Amanda Ferguson.)

Q. That is after you had been down to Phoenix and had been examined by Dr. Westfall and Dr. Eisenbeiss? A. Yes.

Q. Did you ever report back to Dr. Arnold after the examinations were made in Phoenix?

A. Yes, I did.

Q. Then you decided to change doctors?

A. Yes.

Q. Do you notice the dizziness as much as you did before?

A. Not as much. If I get too hot or too tired.

Q. Then you notice it? A. Yes.

Miss Reimann: No further questions. [25]

Redirect Examination

By Mr. Kaplan:

Q. Mrs. Ferguson, what doctor first told you that you had high blood pressure?

A. Dr. Brazie.

Q. And I believe he told you that on an occasion you had to visit his office some, perhaps two years prior to the accident, is that correct?

A. Yes.

Q. Did you go to him for any symptoms or complaints referable to high blood pressure?

A. No. I believe I had the flu, had an attack of flu.

Q. At that time he took your blood pressure?

A. Yes.

Q. And informed you it was a little high?

(Testimony of Amanda Ferguson.)

A. Yes.

Q. And he gave you a prescription for it?

A. Yes.

Q. Did he ever ask you to return for further treatments for that condition?

A. I can't recall just how many, how long he treated me, not very long.

Q. Was it very long?

A. Not very long.

Q. In other words, it was temporary treatment and then [26] you went about your business?

A. Yes.

Q. You continued——

Miss Reimann: Now, I have let these leading questions go on and on. I believe they are getting a little too much. I realize the situation, but I am going to object to the leading questions at this time.

The Court: Don't lead the witness.

Q. (By Mr. Kaplan): In any event, Mrs. Ferguson, had you ever at any time felt of such condition that you were not able to continue with your employment or not able to work prior to the accident?

A. No.

Q. Except for the minor colds and so forth?

A. No.

Q. With regard to housework, prior to the accident, will you tell the Court what you did with regard to household duties?

A. I did the most of my housework and cooking and so forth.

Q. And now, as you previously testified, the only

(Testimony of Amanda Ferguson.)

thing you do is cooking and making the beds?

A. Yes, the light work.

Q. Everything else your husband does?

A. Yes.

Mr. Kaplan: No further questions. [27]

Miss Reimann: No further questions.

The Court: What did you say your age was, Mrs. Ferguson?

The Witness: Fifty-five.

The Court: That is all.

(Witness excused.)

CLARA OSTERMAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kaplan:

Q. Will you please state your full name?

A. Clara Osterman.

Q. Where do you live, Mrs. Osterman?

A. Kingman, Arizona.

Q. What is your occupation?

A. Cafe operator.

Q. What is the name of your cafe?

A. Casa Linda Cafe.

Q. Have you had occasion to employ at your cafe Mrs. Amanda Ferguson, the plaintiff in this action? A. Yes, I do.

Q. When did Mrs. Ferguson first go to work for you, if [28] you recall? A. In 1950.

(Testimony of Clara Osterman.)

Q. Do you recall the occasion of Mrs. Ferguson being involved in an accident on June 24, 1955?

A. Yes, I do.

Q. Had Mrs. Ferguson continued to work for you from 1950 to the time of the accident?

A. That is right.

Q. Will you please tell the Court what Mrs. Ferguson's duties were?

A. She was a fry cook in the beginning for about two years, then she was a dinner cook.

Q. Will you tell the Court what her duties required her to do?

A. On fry cooking it was afternoon, 1:30 to 9:30. She took the short order work and practically she was by herself outside the salad girl in the winter time. Winter time she did it all by herself. Then when she went on mornings as a dinner cook she prepared the dinner, cooked some breakfast and made the pies and also checked the groceries and gave me the list of what was needed.

Q. How did you find her work to be?

A. Very satisfactory.

Q. Mrs. Osterman, there has been some question here about the size of your cafe. Will you tell the Court what size it [29] is or how many people it holds?

A. Sixty-two. I have twelve tables and fourteen stool counter.

Q. Were Mrs. Ferguson's duties such that required here to be in good health? A. Yes.

Q. During that five year period or almost five

(Testimony of Clara Osterman.)

years that she worked for you had Mrs. Ferguson ever missed time from work because of illness?

A. I think in '54 and '55; she was off four days in '54 and '55 she was off a week. I think she would have been able to come back a couple of days earlier but she had a vacation coming up and she asked if I would allow that time on a one week's vacation and then she took one week later on.

Q. How about by reason of illness?

A. This is in January and she had a cold, she had the flu.

Q. Mrs. Osterman, how much was Mrs. Ferguson earning?

A. Sixty dollars a week with a six dollar board allowance.

Q. Sixty dollars a week plus six dollars board allowance?

A. That is right, six day week.

Q. Actually the salary amounted to sixty dollars a week?

A. That is right.

Q. Mrs. Osterman, after Mrs. Ferguson was involved in this accident she attempted to go back to work for you, is that correct? [30]

A. That is right.

Q. Will you tell the Court what you noticed about Mrs. Ferguson's condition at that time when she tried to return to work as compared to her condition prior to the accident?

A. She wasn't up to par. She didn't do her work as fast. Her daughter worked with her to bring up the breakfast and did a lot of her dinner work. I asked her a couple of times how she felt and she

(Testimony of Clara Osterman.)

said, "All right, I guess. I think I will be all right in a day or two." She is not a woman to complain.

Q. In other words, she tried her best to keep up with her duties as a cook? A. That is right.

Q. So far as you could tell did she want you to go back to work and continue with her work?

A. Yes, she did. She tried awfully hard in those last four weeks. I wouldn't have been able to keep her if I didn't have her daughter there to pick up for her.

Q. Mrs. Osterman, specifically did you notice Mrs. Ferguson's condition with regard to her memory after the accident, as compared with what it was before? A. Yes, I did.

Q. Will you tell the Court the difference?

A. It wasn't as good as—as I stated before, she was slow in her work, her work wasn't as far advanced when lunch [31] time came, she was a little bit behind. I noticed also I had to help her and in keeping up the supplies for the restaurant.

Q. If Mrs. Ferguson were well and able to return to work——

A. I would like to have her very much.

Mr. Kaplan: No further questions.

Cross-Examination

By Miss Reimann:

Q. From the time that she returned to work for you, which I believe was in July of '55?

A. Yes.

(Testimony of Clara Osterman.)

Q. And you have observed her on the street and all since that time?

A. Yes. She has been down to my place several times. I have seen her on the street I think maybe once or twice; it happened she was never up there when I was there.

Q. Since that time until now can you see any improvement in Mrs. Ferguson from the time she worked for you when she came back in July of '55?

A. I think so.

Q. She appears better to you today than she did then?

A. Right away, yes, right after the accident.

Q. She is better now than when she returned to work for you in July of '55?

A. I haven't seen her very much to talk to her, I haven't [32] been around her too much. I couldn't say too much for that.

Q. How does she appear to you?

A. I think she appears somewhat better.

Miss Reimann: No further questions.

Mr. Kaplan: May this witness be excused, your Honor?

The Court: You may be excused.

(Witness excused.)

(Recess.)

ESTELLE HOPKINS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kaplan:

Q. Will you please state your full name?

A. Estelle C. Hopkins.

Q. Where do you live, Mrs. Hopkins?

A. Kingman, Arizona.

Q. Are you related to Mrs. Amanda Ferguson, the plaintiff in this action?

A. I am her daughter.

Q. Were you the daughter that was with Mrs. Ferguson at the time this accident occurred?

A. I am. [33]

Q. I believe you heard your mother testify as to how the accident happened. Is that your recollection of it also?

A. Yes, it is.

Q. In other words, you were both sitting in the parked car when the truck hit?

A. We had just got in.

Q. Mrs. Hopkins, is your mother's family, that is your children and she and your father a close family?

A. Yes.

Q. Do you have occasion to see each other often?

A. Every day.

Q. And have you had occasion to see each other that often for a long period of time?

A. Yes.

Q. Can you tell the Court what injuries your mother received in the accident, as best you recall?

(Testimony of Estelle Hopkins.)

A. Well, she was hit on the head and she was bruised, her knees was bruised and her back hurt her.

Q. Mrs. Hopkins, have you had occasion to compare your mother's health and general physical condition after the accident with that before the accident? A. Yes, I have.

Q. Will you please tell the Court in your own words just what you have observed about your mother's condition since the accident as compared with what it was before? [34]

A. She is very nervous now and she wasn't. And her headaches, and even now she will tell me something, I will be at the house in the morning and she will tell me something about some news; and I will go that evening again and she will tell me the same news as if she hadn't told it.

Q. Her memory seems to be faulty?

A. That is right.

Q. How was her memory before the accident?

A. Very sharp.

Q. Go ahead, Mrs. Hopkins.

A. Well, she doesn't seem to be able to do the things she did. She gets tired, she has to sleep a lot and before she didn't.

Q. How is she around the grandchildren?

A. Pretty nervous. We try not to take many around, but when they are around she can't take it.

Q. Was she ever that way before the accident?

A. No, she wasn't.

(Testimony of Estelle Hopkins.)

Q. These symptoms which you have described, are they still noticeable even today?

A. Yes. For quite awhile after the accident she had a time getting her directions correct. She had lost her sense of direction. She would intend to go to the back part of the house but would go to the front part sometimes, lose her way.

Q. Has that seemed to improve? [35]

A. It has improved, yes it has.

Mr. Kaplan: No further questions.

Cross-Examination

By Miss Reimann:

Q. You would say your mother has improved since the accident? A. Because——

Q. Just answer yes or no. A. Yes.

Q. The nervousness and headaches and all, they are some improved since the accident?

A. A little.

Q. How many children do you have?

A. Ten.

Q. You have ten? And when you go over there do you take all ten children? A. No, I don't.

Q. Did you know your mother had high blood pressure prior to the accident?

A. She never complains.

Q. Did you know whether she did or not?

A. At one time she said she did.

Q. Do you know when that was?

A. Quite a few years back I think. [36]

(Testimony of Estelle Hopkins.)

Q. She told you at that time she had high blood pressure?

A. She said Dr. Brazie said she had high blood pressure.

Q. She was being treated for it at that time?

A. I guess.

Q. Have you worked with her all five years in the cafe?

A. It is my other sister that works.

Q. With ten children I guess I should have guessed that one. You have lived in Kingman for quite a few years yourself?

A. For twelve years.

Q. Now, when the accident occurred was she ever unconscious? A. No.

Q. She was conscious all the time?

A. Yes.

Q. And I believe she testified she had a cut above the eye? A. Yes.

Q. Were you with her when they took her to the hospital?

A. I had to stay with the wreck.

Q. Did you take her home from the hospital afterwards, do you recall?

A. I think it was my sister.

Q. How did she appear when she got out of the hospital?

A. She was very nervous, very wrought up.

Q. When she went back to work the first time, the only time actually after the accident, did you see

(Testimony of Estelle Hopkins.)

her at that time, [37] did she appear nervous and all at that time?

A. She concentrated on just her work because she couldn't do anything else.

Q. When she returned to work did she appear pretty upset and nervous when she returned?

A. Yes, she did. She seemed not herself.

Q. But she went back to work anyway?

A. Yes, she did.

Q. And as far as your mother's appearance, her outward appearance, is it about the same as it was before the accident?

A. Outward she is a very calm person.

Q. She looks today about the same as she did before the accident?

A. I don't think she does.

Q. She is about the same weight, is that correct?

A. Yes, maybe the same weight.

Q. She had the gray hair before the accident?

A. Yes.

Miss Reimann: No further questions.

Redirect Examination

By Mr. Kaplan:

Q. Is your mother in at least as good health now as she was before the accident?

A. No, she isn't. [38]

Mr. Kaplan: No further questions.

Miss Reimann: That is all.

WALTER BRAZIE, M.D.

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kaplan:

Q. Will you state your full name?

A. Walter Brazie.

Q. Where do you live, sir?

A. Kingman, Arizona.

Q. What is your profession?

A. Physician.

Q. Are you duly licensed to practice medicine in the State of Arizona? A. I am.

Q. For how long have you practiced medicine in Arizona? A. Thirty-one years.

Q. For how long have you practiced?

A. Thirty-one years.

Q. Started your practice there?

A. That is right.

Q. Dr. Brazie, will you please relate to the Court what [39] your qualifications are as a physician, informing the Court of where you went to school and what hospitals you interned in, and so forth?

A. I graduated from the University of Nebraska and interned at Emanuel Hospital in Omaha and practiced medicine at Ft. Mohave, Arizona; Oatman, Arizona, and Kingman, Arizona; been in Kingman since 1928.

Q. Doctor, have you had occasion to treat Mrs.

(Testimony of Walter Brazie, M.D.)

Amanda Ferguson? A. I have.

Q. I think, Doctor, you have been her family physician for some years?

A. About eight years I remember.

Q. Do you recall offhand when it was that you first had occasion to see Mrs. Ferguson?

A. About 1951.

Q. And have you had occasion to see her intermittently ever since that time?

A. I have, oh, maybe once a year average. Two or three times she has had colds, flu, and things of that kind.

Q. You are aware of course, Doctor, Mrs. Ferguson was involved in an automobile accident June 24, 1955?

A. I got that history from her, yes.

Q. Prior to that accident, Doctor, had Mrs. Ferguson ever consulted you by reason of symptoms which you would [40] relate to high blood pressure?

A. We found she had high blood pressure on one of her visits when she complained she had the flu, I think it was, and was under par and couldn't get over it as far as she thought she should. And we took her blood pressure and found it was elevated at that time.

Q. She hadn't consulted you for that?

A. No, that wasn't what she came in for, that was a kind of side issue.

Q. Having discovered this high blood pressure, Doctor, do you recall what you did for her to reduce it?

(Testimony of Walter Brazie, M.D.)

A. We gave her the usual medication for hypertension and she returned, I think, three times for re-checks. My records show we didn't make much impression up on the hypertension.

Q. Why was that, Doctor?

A. Some of them are slower to respond than others. I think it was a period of about two months she had returned; sometimes you don't get results in two months. Then I didn't see any more of her for sometime.

Q. Doctor, that one occasion you had to treat Mrs. Ferguson for high blood pressure when you happened to discover it at that time in your office, can you tell the Court whether or not her hypertension was anyway disabling at that time?

A. No, it wasn't. [41]

Q. In other words, Doctor, she was able to continue with her normal daily activities?

A. Yes.

Q. Doctor, during all this time you have seen Mrs. Ferguson, will you describe to the Court what type woman she is with regard to complaining or relating symptoms or things of that nature?

A. She is very quiet, easy going type woman, and you have to sort of pull information out of her. She didn't volunteer very much. She certainly doesn't complain and she didn't seem to be particularly concerned about this hypertension. She wasn't as concerned about it as I was when we found it. She evidently figured she had gotten along pretty well with it and felt all right and it didn't

(Testimony of Walter Brazie, M.D.)

seem to worry her a great deal. But the times I have seen her for any illnesses they have been rather acute illnesses and she has been pretty sick and she didn't stay off work any longer than she had to and always wanted to get back a little too soon.

Q. As you say, Doctor, this hypertension she had was not disabling? A. It was not.

Q. That very frequently is the case of people who have hypertension, is it not?

A. Oh, yes. There are lots of people running around with hypertension doing some of the big jobs being done today. [42]

Q. Doctor, specifically calling your attention to September 26th, 1955, I believe that was the day upon which Mrs. Ferguson first consulted you with regard to the symptoms she was having as a result of this accident, is that right?

A. That is right.

Q. Will you tell the Court what her subjective symptoms were at that time?

A. She came in and told me about this accident that she had and the symptoms that she was complaining of were simply a continuation of what she had ever since the accident.

Q. What were they, Doctor?

A. She had headaches, dizziness, blurring of vision and loss of memory.

Q. How about weakness?

A. And general weakness, that is right.

Q. On that occasion, September 26th, 1955, did

(Testimony of Walter Brazie, M.D.)

you take her blood pressure? A. I did.

Q. What did you find it to be at that time?

A. I found it to be elevated higher than it was when I had seen her in 1951, or had last taken her blood pressure.

Q. Would you say that was a sharp elevation?

A. Yes, it was some eighty points in systolic pressure.

Q. Doctor, have you continued to see Mrs. Ferguson since September 26th, 1955? [43]

A. Yes, I have seen her at rather regular intervals, approximately every two weeks.

Q. Do you recall when you last had occasion to see her? A. I saw her the 3rd of July.

Q. Do you recall what her blood pressure was at that time?

A. If I can refer to my notes here. 180 over 130.

Q. What would you say normal blood pressure is for a woman her age?

A. There is a wide variation of normal.

Q. What would you consider within normal limits, let me put it that way?

A. From the clinical standpoint, my own personal feeling in the matter, I always consider anything over 150 is some elevation.

Q. 150 systolic?

A. Systolic, that is right. And from there on up there is a lot of variation. A lot of people have 160 and 70 and get along very nicely, 180 even.

Q. What was her diastolic pressure?

(Testimony of Walter Brazie, M.D.)

A. Diastolic pressure was 130. Her diastolic has always run very high. In fact, in the dangerous category. She has always had a relatively high diastolic pressure.

Q. Doctor, have you tried to reduce Mrs. Ferguson's blood pressure in all this time? [44]

A. Yes, we have.

Q. What have you done in that regard?

A. We have tried all the ordinary hypertensive drugs. We have shifted from one to the other and combinations. We have made some little impression on it, which has been variable.

Q. Have you ever succeeded in reducing her blood pressure to within normal limits?

A. Not normal, no.

Q. Doctor, based upon the history as you know it to be, and as reported to you by Mrs. Ferguson, and based upon your examination and continued examinations of Mrs. Ferguson to the present time, do you have an opinion as to whether or not the accident of June 24th, together with the injuries which Mrs. Ferguson received in that accident, aggravated her pre-existing hypertension and brought about the symptoms which occurred following the accident and which have persisted to the present time?

A. I think that is correct, yes.

Q. Do you have an opinion in that regard, Doctor?

A. I do.

Q. What is your opinion?

A. Just as you have stated it, I think the result

(Testimony of Walter Brazie, M.D.)

is as a result of this accident and from that time, that is timing it from that time, and presumably it was a result of the [45] accident. Of course, we can't guarantee that, because anybody that has a hypertension is always in potential trouble, but coming on definitely right at that time and the complaints and symptoms all being so definite and so persistent, I feel that they certainly had, the symptoms of which she complains and from which she obviously suffers definitely began at that time.

Q. Are those symptoms disabling, Doctor?

A. And they are disabling.

Q. In your opinion, Doctor, will Mrs. Ferguson ever again be able to return to a gainful occupation?

A. I do not think so.

Mr. Kaplan: You may cross-examine.

Cross-Examination

By Miss Reimann:

Q. You stated, Doctor, that you were never able to bring her blood pressure down to within normal limits. The first time you examined her, which was before the accident, her blood pressure was not within normal limits at that time?

A. That is right, it was not.

Q. She is a person that has lived all her life with a higher blood pressure?

A. I wouldn't say all of her life. She has lived a long time. [46]

Q. That didn't affect her at that time?

(Testimony of Walter Brazie, M.D.)

A. No. She seemingly did very well.

Q. And actually since the time of the accident at times her blood pressure has been lower than it was when you took it previous to the accident, isn't that correct?

A. That is right, under intensive treatment and with some of these newer drugs we didn't have five years ago.

Q. It has been lower than it was prior to the accident?

A. That is right. It didn't stay down, but it has been at times.

Q. The last blood pressure you took, which I believe you said was on last Tuesday? A. Yes.

Q. Was 180 over 130? A. That is right.

Q. Wasn't that about the same as it was when you took it prior to the accident?

A. That is right. That is right, practically the same. In fact, one reading we have on May 19, 1951, is 180 over 130.

Q. Now, in March of this year you took her blood pressure, isn't that correct?

A. March of this year?

Q. Yes. A. 1956, yes.

Q. What was her blood pressure then? [47]

A. 165 over 120.

Q. Actually then it was a little lower than it is now? A. Yes.

Q. When you take a blood pressure, Doctor, when you take somebody's blood pressure, do the

(Testimony of Walter Brazie, M.D.)

circumstances that surround it at that time make a difference in what the reading might be?

A. With a great many people it does.

Q. I wonder if you would explain that a little?

A. Well, hypertension is one of the main factors and the cause of hypertension comes through the nervous system, causing a spasm of the blood vessels which makes the blood vessels smaller and the blood pressure comes up. So we always take that into consideration when we take a blood pressure and usually take more than one reading. In other words, I personally never pay any attention to the first reading. We take it and let it down, take it two or three times and while we are doing that we usually try to engage them in conversation.

Q. Keep them as calm as possible?

A. That is right, keep their mind off this. So we can get it fairly accurate in lots of them. In the case of Mrs. Ferguson though I never felt that was an important factor, her temperament being what it is it did not seem to make any difference, that [48] part.

Q. Prior to the accident did you feel that Mrs. Ferguson was on a normal plane or did you have a feeling that possibly she was going down hill prior to the accident, when you first treated her?

A. No. The only time I saw her was, say, occasionally from time to time with acute illnesses; and her only concern was to get over her acute illness and get back to work, which she did. Since I

(Testimony of Walter Brazie, M.D.)

have seen her, since last September, there is a definite change in what, as I knew her before.

Q. Before when you treated her for high blood pressure she weighed about what she does today, is that correct?

A. I don't have it down here offhand what the weight is, but I would say, seeing her, it is practically the same. She doesn't look much different physically.

Q. Did you recommend at that time she lose some weight? A. We always recommend that.

Q. Actually weight has a great deal to do with high blood pressure, doesn't it?

A. Oftentimes a factor with many of them.

Q. This high blood pressure to start with sometime ago might have been caused in part by the excessive weight of Mrs. Ferguson?

A. I wouldn't say caused by, but they tend to run together oftentimes. It could be a factor.

Q. Isn't it true when you reduce the weight the blood [49] pressure very often reduces?

A. In many cases it comes down.

Q. Mrs. Ferguson hasn't lost any weight?

A. Not a great amount of weight. She has made valiant attempts, like many of those people do.

Q. When you reduce the weight and you have high blood pressure, say, there is quite a drop right at first? As you lose the weight, say lost five or ten pounds all at once, then your blood pressure drops very rapidly?

A. There is no correlation whatsoever in any

(Testimony of Walter Brazie, M.D.)

individual case. You hope there will be, but it doesn't always work out that way.

Q. That is the normal?

A. I wouldn't say normal.

Q. That when you lost weight it doesn't affect the blood pressure?

A. In many cases it has no effect whatsoever.

Q. You wouldn't even say that is normal?

A. I wouldn't say that I expect every time a patient loses weight that the blood pressure will go down.

Q. You would say that anytime a patient comes in to you and is overweight and has high blood pressure that you would certainly recommend——

A. I would assume it is a factor until proven otherwise.

Q. And you so recommended in the case of Mrs. Ferguson [50] prior to the accident?

A. Yes.

Q. And since the accident, too?

A. Yes, most emphatically.

Q. Have you provided her with any diets?

A. Oh, yes. We encourage them all we can.

Q. Now, since you have started treating Mrs. Ferguson, which I believe was three months after the accident on September 26th, 1955, when was the last time you saw her prior to that?

A. I saw her January 18th, 1955; January 14, 15, and 18. That was a very persistent cold that hung on and hung on.

Q. You didn't see her for a period of——

(Testimony of Walter Brazie, M.D.)

A. Until September 26th, 1955.

Q. And at that time what type examination did you give her when she came in to you, on September 26th, 1955?

A. We checked her blood pressure and the nervous reflexes, the usual ones, to see if there was any paralysis, indication of any paralysis.

Q. Was there any indication of any?

A. I could find none.

Q. Did you run any lab tests?

A. I did not.

Q. No blood tests of any kind?

A. No. [51]

Q. No sugar tests of the urine?

A. Yes, we ran an albumin sugar.

Q. What was that? A. Negative.

Q. Are there any, outside of the hypertension, are there any objective things you can find that are actually wrong with Mrs. Ferguson?

A. The impression I get is this, from the physical standpoint—you are talking about objective symptoms?

Q. That is right.

A. Her reactions are not as fast, are not as quick as they were before. She is a little more sluggish and slow moving. That is the obvious thing I noticed.

Q. Would anybody with a high blood pressure that she had and having had twelve children and worked five years as a cook, wouldn't it be rather usual a person would begin to slow down a little?

(Testimony of Walter Brazie, M.D.)

A. Yes. Just when that slowing process—with some people it is gradual, some people more rapid. But she gives the typical appearance of a person that has had what we call a little stroke, in which these things come on rather suddenly.

Q. Are there any symptoms or evidence she had such? A. From the history I got from her.

Q. From your examination, not from her history?

A. All right. As far as the neurological examination [52] is concerned, no. But these little strokes, you must depend on your clinical history and symptoms rather than the objective.

Q. Actually, most of the basis of your opinion you have given today is based on the history she has given you rather than any tests of your observation you have performed yourself?

A. The history she has given me plus my knowing this patient before.

Q. I believe you say you saw her on the average of once a year? A. Yes.

Q. Would seeing a patient on the average of once a year, would you have a very general idea actually of that patient's health, when you only treated her for colds?

A. Yes. In a small town where we see members of the family and they come in with other members of the family, we get to know our patients rather well.

Q. Mainly by chatting with the family, what they tell you?

(Testimony of Walter Brazie, M.D.)

A. You bet, we get a lot of information from the family.

Q. What other tests did you run? What other type tests did you run?

A. That is it, blood pressure, urinalysis, as far as lab, that is the extent of it.

Q. Did you get any reports from any other doctors? A. I did not. [53]

Q. Dr. Westfall didn't send a report to you?

A. No.

Q. Did Dr. Eisenbeiss? A. No.

Q. None of those reports? A. No.

Q. Do you know she had gone down there?

A. She told me she had gone to Phoenix for an examination.

Q. Did you know she had gone to Dr. Arnold, or was going to Dr. Arnold at the same time she was going to you?

A. I knew she had been to him. I knew he took care of her at the time of the accident.

Q. Did you ever discuss this case with Dr. Arnold, as far as the accident is concerned, and his treatment and what he might have prescribed?

A. I have never discussed it.

Q. You say there is some improvement since you started treating her?

A. Yes, there is some little improvement in her general condition.

Q. Actually, back to this weight process, if a person loses weight and, say, that it helps—just

(Testimony of Walter Brazie, M.D.)

assume for the moment it does help and helps reduce the blood pressure—doesn't that also help such things as dizziness and nervousness?

A. To the extent they are the result of [54] hypertension and hypertension comes down.

Q. Do you think the dizziness and nervousness in Mrs. Ferguson's case is the result of the hypertension?

A. All those things you get as a result of hypertension.

Q. At the time you first examined Mrs. Ferguson after the accident, which was three months, was there any evidence at that time at all to you of any physical damage that you could see?

A. None.

Q. None whatsoever? A. No.

Q. Do you feel with the hypertension Mrs. Ferguson had prior to the accident that she could have broken down at any time?

A. It is possible.

Q. From the opinion that you have reached in this case do you base it mainly on the history she gave you, your examination, or just what?

A. The history that she gave me, my observation of the patient both before and after the accident. It is based on all of it.

Q. Now, you said that you had the opinion that Mrs. Ferguson could not return as a cook, is that correct, to gainful employment?

A. That is right. In fact, I insisted when she

(Testimony of Walter Brazie, M.D.)

first [55] came to me, she was still planning to go back to work and was anxious to go back to work. That was one of my first jobs was to impress upon her that she should forget about it.

Q. Do you feel she could do light housework?

A. I think so.

Q. Do you feel she could do baby sitting?

A. Up to a point, depending a great deal on the baby and her reaction to the children. Sometimes older folks can do that well and sometimes it bothers them a great deal. From the physical standpoint she could.

Q. From a mental standpoint?

A. From the nervousness, hypertension that oftentimes goes with that.

Q. With what?

A. Baby sitting, if you ever sat with a baby.

Q. What do you base the nervousness on, do you take it back to the hypertension?

A. I think she definitely has more tension now than she used to have.

Q. But she doesn't have higher blood pressure than she used to have?

A. I would say essentially that there is no material change, at least there were at times. It has been up and down, but averaging it out there hasn't.

Q. You don't know whether it was up and down prior to [56] the accident or not?

A. Have no way of knowing. The three times she came to me it was practically the same all three times.

(Testimony of Walter Brazie, M.D.)

Q. You didn't treat her after *that*?

A. For no hypertension, only acute conditions.

Q. I asked you, I believe, where you feel this nervousness is coming from if it isn't coming from the hypertension and you can't find anything else of any objective symptoms that is wrong with Mrs. Ferguson, you feel it is something she has worked up herself?

A. No. I see what you are getting at and I know that is a very important factor in many of these cases. I feel it isn't so much so, put it that way.

Q. Do you think Mrs. Ferguson has been nervous over the prospect of this case?

A. I think there has been some tension connected with it, but I don't think over the period of time I was taking care of her, especially in the first part of it, that was a big factor.

Q. What medicines are you giving today?

A. At the present time, the last time I saw her, and that would be in—let me see—I took her blood pressure last, was May 21st. I took her off of the medication we had and put her on chlor-trimeton, which is not a hypertensive drug primarily, which is an antihistamin. But there has [57] been some work later in which they have gotten some pretty good results on these stubborn hypertensive cases. So I put her on that and the last time I added some rauvera.

Q. Dr. Brazie, when she came to you prior to the accident and she had this high blood pressure why did you just treat her three times and let her

(Testimony of Walter Brazie, M.D.)

go, why didn't you keep working on different medicines to lower her blood pressure?

A. Because the patient did not return for that purpose.

Q. Had you instructed her to?

A. We always instruct them to return at regular intervals, but she wasn't particularly concerned with her hypertension and oftentimes she felt all right, and, as people do, she didn't come back.

Q. But there is no question she had it as high then as she does now? A. Definitely.

Q. You do feel there is some improvement in the nervousness?

A. Yes, in every respect she is better than she was in September when I first saw her.

Q. There isn't as much dizziness now, is there?

A. I think all her symptoms have improved a little.

Q. I think she complained prior that she had trouble in seeing and maybe saw double and now she is able to read?

A. All those symptoms have improved.

Q. Is there any reason, Doctor, why they won't continue [58] to improve?

A. I have the feeling they have about reached the stationary point.

Q. Why do you feel that way? She has been improving right along, hasn't she?

A. Nervous tissue is a little slower to repair.

Q. Has there been any actual damage to the ner-

(Testimony of Walter Brazie, M.D.)

vous tissue? A. I feel there has been, yes.

Q. You don't know? I mean no tests have been run?

A. That is right. It would take an autopsy to prove it.

Q. Aren't there tests that can be given?

A. There is no tests to tell, at least that I have.

Q. There are tests available elsewhere?

A. Oh, they could tell you in a rough sort of way. You couldn't guarantee the results.

Q. Have you ever recommended that Mrs. Ferguson go to another doctor, a specialist in the nerves? A. I have not.

Q. You don't feel that would be——

A. I didn't feel she would gain anything by it.

Q. What are the main causes of hypertension?

A. We have what we call a neurogenic background, which is the basis for a very very large percentage of them, the sympathetic nervous system; in some way it is unbalanced and causes spasms of the blood vessels, causes the pressure to go [59] up. That is one of the big factors.

Q. Have you been able to determine in Mrs. Ferguson's case what the case is or was?

A. No. Just as many of these women and a large per cent of them when they go through the menopause, say forty-five on, the nervous system seems to be thrown out of balance and many of them have their origin at that time. I would presume at the time she came she was about fifty years

(Testimony of Walter Brazie, M.D.)

old, when I first saw her, and probably that very possibly could have been the factor.

Q. What was the first date you took her blood pressure? A. April 23rd, 1951.

Q. In 1951. At that time it was 180 over 130?

A. 180 over 140.

Q. Over 140.

A. It came down to 180 over 130.

Q. The last time you took it?

A. The last time, in May, 1951.

Q. And you feel that this accident, even though she had that high blood pressure before and had twelve children and living as she was, the accident, even though the blood pressure is the same, has caused the rest of it?

A. I think it is a precipitating factor, yes.

Q. What are the other factors?

A. Anyone with that high a blood pressure there is always [60] a possibility of cerebral hemorrhage, so-called apoplexy.

Q. That could have happened at any time?

A. That could have happened at any time.

Q. It could happen at any time now?

A. That is right. So there is that factor to consider. But from the history and the observation and all I get the feeling that at that time—this is in my personal hunch, I can't prove it——

Q. This is a hunch?

A. It is my personal opinion, put it that way, a better word, that I think she had what we call a little stroke at or shortly after. I think the accident,

(Testimony of Walter Brazie, M.D.)

naturally her blood pressure went up, it would with any person, and it went up terrifically and probably stayed up for awhile. And during that time she had a little, what we call a little stroke, didn't produce paralysis, you understand, but your physical symptoms and digestive symptoms and——

Q. You think that was right after the accident?

A. From her history I got it this time when I took her history, the first time I saw her, I got it from her that about a week after the accident——

Q. When she went back to work?

A. I didn't tie it in with the work, but roughly about a week after the accident that she had a rather acute episode of headaches, severe headaches, much worse than she had, severe [61] headaches and visual disturbances and dizziness. It was a rather acute episode.

Q. That is what she told you?

A. That is what she told me.

Q. At that time she was a patient of Dr. Arnold's, is that correct?

A. Yes, she would have to be, yes.

Q. Now, have you ever examined the records of the hospital when she was in there?

A. I have not.

Q. You have never seen them? A. No.

Q. You don't know actually what treatment she was given or anything about that?

A. I know nothing about it.

Miss Reinmann: No further questions.

(Testimony of Walter Brazie, M.D.)

Redirect Examination

By Mr. Kaplan:

Q. Dr. Brazie, Miss Reimann has brought forth from you testimony to the effect that it is possible that Mrs. Ferguson could have broken down, so to speak, if I can reduce it to the common vernacular, at any time because of this pre-existing hypertension, is that true? A. That is right. [62]

Q. It is also possible, is it not, Doctor, that she could have continued to live her normal life expectancy—— A. That is possible.

Q. ——and died of natural causes other than the hypertension? A. That is possible.

Q. As a matter of fact, we know that she was involved in an accident and as a matter of your own personal observation of Mrs. Ferguson, you have noticed a definite change since the accident from before? A. I have.

Q. And are all of the symptoms which Mrs. Ferguson had and related to you and symptoms which still persist today, are they compatible with the objective findings and your observation?

A. That is right.

Q. Have you any reason to believe her symptoms have been in any way exaggerated or falsified?

A. I do not. Quite the contrary. I think this particular woman would be less so. I know that occurs in lots of people; I don't think that has any bearing at all in this case.

(Testimony of Walter Brazie, M.D.)

Q. In your qualified medical opinion those symptoms were brought about by this accident?

A. The condition which——

Q. She is now in? [63]

A. ——the condition which produces these symptoms I think was brought about or we will say——

Q. Was precipitated?

A. ——was precipitated——

Miss Reimann: Let the doctor answer.

The Witness: ——by the accident.

Mr. Kaplan: That is all.

Recross-Examination

By Miss Reimann:

Q. But they could have happened without the accident?

A. Could have happened at any time.

Miss Reimann: That is all.

The Court: Doctor, I think you said in 1951 when you discovered this high blood pressure that one of those factors was dangerously high?

A. The diastolic, that is right. Whenever you get over 100 it is worthy of serious consideration; when you get up to 130 and 140 it is very serious.

Q. You recommended to Mrs. Ferguson she continue treatment with you and medication to control that?

A. Oh, yes. We never discharge a patient with that kind of blood pressure.

(Testimony of Walter Brazie, M.D.)

Q. When she ignored or refused to carry out your instructions did you feel it then probable she would have some [64] dangerous developments from her neglect of that condition?

A. Yes, there is always a possibility of anyone with a pressure of that kind having an accident at any time. Also it isn't always we can reduce them for them either.

Q. What I am getting at, Doctor, you told counsel in answer to a question that it is possible she might have gone on and died entirely of other causes, but what I am getting at, with this dangerously high blood pressure and her neglect of her condition, would you have thought it probable if she continued to do that she would have died of natural causes?

A. No, I think the percentages would be against it.

The Court: That is all.

Redirect Examination

By Mr. Kaplan:

Q. In that connection I take it your reason for so stating is because it was not disabling in any way, it was not producing disabling symptoms at the time before the accident? A. That is right.

Mr. Kaplan: That is all.

The Court: That is all, Doctor.

Mr. Kaplan: May the doctor be excused?

The Court: You may be excused, Doctor.

(Witness excused.)

The Court: We will recess until 1:30. [65]

(Noon recess.)

JOHN FINLEY WESTFALL, M.D.

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kaplan:

Q. Will you please state your full name?

A. John Finley Westfall.

Q. Where do you live?

A. Phoenix, Arizona.

Q. What is your profession, sir?

A. Physician.

Q. Are you duly licensed to practice medicine in the State of Arizona, Doctor? A. I am.

Q. Are you presently associated with the staff of any clinic?

A. I am, with the Department of Internal Medicine at the Grunow Clinic.

Q. I take it from what you say, Doctor, that you specialize in internal medicine?

A. That is correct.

Q. Will you briefly state to the Court your qualifications [66] to practice internal medicine, also telling the Court where you went to school?

A. I went to school at George Washington University, Washington, D. C., graduated in 1947; had one year internship, three years of residency in internal medicine.

(Testimony of John Finley Westfall, M.D.)

Q. At what hospital?

A. George Washington University Hospital.

Q. Doctor, are you a member of the Board of Internal Medicine, is that the proper name?

A. That is the proper name. No, I am not.

Q. Do you practice in association at the Grunow Clinic with other doctors who specialize in internal medicine?

A. I do.

Q. Of what hospitals are you a staff member in Phoenix?

A. In Phoenix, Good Samaritan Hospital, St. Joseph's Hospital, Memorial Hospital and St. Luke's Hospital.

Q. Dr. Westfall, have you had occasion to examine Mrs. Amanda Ferguson, the plaintiff in this action?

A. I have.

Q. Do you recall when it was you first examined her?

A. I examined Mrs. Ferguson on August 23rd, 1955.

Q. At whose request?

A. At the request of Dr. John Eisenbeiss.

Q. Doctor, will you relate to the Court what history Mrs. Ferguson gave to you at that [67] time?

Miss Reimann: Just a moment. I am going to entertain an objection here if this is past history, if this doctor didn't treat her. I don't know whether he examined her just for the purpose of testifying today or whether there was some treatment, but if

(Testimony of John Finley Westfall, M.D.)

it was for the purpose of testimony, from the previous testimony it does not appear he did treat her——

Mr. Kaplan: Perhaps I should clarify it, your Honor.

Q. (By Mr. Kaplan): What was the purpose of your examination, Doctor?

A. At the time I examined Mrs. Ferguson the only thing I knew about her was that Dr. Eisenbeiss had requested that I see her in medical consultation.

Q. You examined her on August 23rd, 1955?

A. Correct.

Q. Have you examined her since then?

A. I did not.

Q. Did you examine her for the purpose of testifying at this trial? A. I did not.

Q. Did you examine her for the purpose of consultation? A. That is correct.

Q. Did you also prescribe any treatment?

A. I did.

Q. Now, Doctor, will you please tell the Court what history, [68] past history and symptoms Mrs. Ferguson related to you at the time of your examination?

Miss Reimann: Same objection, your Honor.

The Court: He may answer.

A. Mrs. Ferguson, at the time I saw her come in with a chief complaint of weakness, dizziness, headaches over her right side of her head. The primary

(Testimony of John Finley Westfall, M.D.)

reason that she was referred was to clarify the cause of a recent episode she had on the 30th of July in the same year, at which time she in the history revealed she had a rather abrupt onset of nausea, vomiting, visual disturbance, headaches and I presumed almost in a state of collapse.

Q. (By Mr. Kaplan): Doctor, will you tell the Court what you did in the course of your examination other than to obtain this history?

A. Regarding history, I further inquired into her past history, at which time she revealed she had been previously diagnosed as having hypertension and at one time had taken medication for this disease. She further gave a history of surgery in the past.

Q. Did she also give you a history of occupation?

A. She did. She stated that she had been employed prior to an accident on——

Q. June 24th?

A. ——June 24th, 1955, as a cook in a restaurant; that she [69] had not worked since the accident that she had had; that the acute episode I referred to occurred approximately one week after the accident.

Q. Now, Doctor, aside from taking of the patient's history will you relate what you did insofar as your examination is concerned?

A. The complete physical examination was done at the time Mrs. Ferguson was in the office. Do you wish me to relate the findings?

(Testimony of John Finley Westfall, M.D.)

Q. Specifically with regard to her heart and hypertension, Doctor.

A. Her blood pressure on multiple reading, by that, seven to eight readings, varied between 230 and 210 cystolic pressure and 120 to 140 diastolic pressure. That was in both arms. There was evidence of a recent scar over the right forehead. Examination of the heart revealed some degree of enlargement, which was further verified on fluoroscopic examination. The remainder of the examination was found to be essentially normal with the exception that the person, Mrs. Ferguson, did not seem to be as alert or spontaneous as I would expect a person of her age to be.

Q. Doctor, will you please state what treatment you prescribed?

A. I advised Mrs. Ferguson to start on a mild drug for her hypertension, and further advised her at that time that [70] I presumed it would be necessary to add further drugs via her prior physician in Kingman, if they were necessary to control her high blood pressure.

Q. Doctor, is it true that frequently persons who have hypertensive heart disease may live their normal life expectancy and die of other natural causes——

A. That is true.

Q. —without being functionally disturbed by the hypertension at all?

A. That is quite possible.

Q. In other words, frequently persons who have hypertension nevertheless are able to carry out their

(Testimony of John Finley Westfall, M.D.)

normal daily occupations? A. Yes.

Q. And yet because of the hypertension their heart or nervous system is not sufficient to withstand the stress of a sudden or severe trauma?

A. That is often true.

Q. Doctor, you have been present in the courtroom and have heard the testimony of Mrs. Ferguson, Mrs. Osterman, Mrs. Ferguson's daughter, and Dr. Brazie, have you not?

A. That is correct.

Q. You have learned from that testimony that Mrs. Ferguson was able to continue her occupation as a cook for five years prior to this accident, without being troubled by the [71] hypertension in any way. And you have learned from Dr. Brazie what his examinations have disclosed and what his treatment has been since September of 1955. Based upon that testimony do you have an opinion as to whether or not the accident in which Mrs. Ferguson was involved on June 24, 1955, together with the injuries she sustained in the accident, aggravated her pre-existing hypertension and thereby brought about this sudden episode of loss of memory, disturbed vision, headaches, extreme nervousness?

A. I would say that is quite possible.

Q. Do you have an opinion with regard to whether or not that is the situation?

A. I would say that it is likely that the accident was a precipitating factor in her present condition.

(Testimony of John Finley Westfall, M.D.)

Q. Doctor, do you have an opinion as to whether or not Mrs. Ferguson will ever be able to return to a gainful occupation again?

A. I doubt that she will be able to.

Q. Doctor, there is the possibility that this lady's condition could have resulted in somewhat the same symptoms without an intervening accident—is that true? A. That is true.

Q. Will you state why it is, if it is, that you believe that it was the accident which precipitated the onset of her present condition, as distinguished from her pre-existing [72] hypertension?

A. My opinion on that would be based on the fact that Mrs. Ferguson had a symptomatic hypertension over a known period of at least four years at which time her general health was apparently good and allowed her to work every day. I believe that in view of that history, with the sudden turn of events coming on subsequent to the accident, that I would say that the accident was the precipitating factor.

Q. Doctor, would you say that it was probable or that it was merely possible that such a condition would have come about, even though no accident had intervened?

A. Would you repeat that please?

Q. We have acknowledged the possibility that Mrs. Ferguson's present condition might have come about even though no accident had intervened?

A. Yes.

Q. Now, would you say that her present condi-

(Testimony of John Finley Westfall, M.D.)

tion probably would have come about even though no accident had intervened, or would you say it is merely a possibility it might have come about even though no accident intervened?

A. I would say my opinion on that would be that it probably would not have come about had the accident not occurred.

Mr. Kaplan: You may cross-examine. [73]

Cross-Examination

By Miss Reimann:

Q. I believe you stated that Mrs. Ferguson was sent to you by Dr. Eisenbeiss? A. Correct.

Q. And that was on August 23rd, 1955. Did you report your findings back to him? A. I did.

Q. And she was sent to Dr. Eisenbeiss by Dr. Arnold in Kingman, is that correct?

A. That is correct.

Q. Did you ever report your findings to any physician in Kingman?

A. I did. A letter was written to Dr. Arnold at Kingman.

Q. Exactly what were your findings at that time?

A. They were the findings as—I believe I related them to the Court a moment ago. Basically, one of a definite hypertension, evidence of enlargement of the heart. There was some dilation of the aortic arch, that being the major blood vessel com-

(Testimony of John Finley Westfall, M.D.)

ing from your heart. I think that was the highlight of the findings.

Q. Actually what you are saying is that she had hypertension, is that correct? A. Correct.

Q. And at that time you knew she had [74] had hypertension previous to that? A. Correct.

Q. And you have heard today that actually the hypertension at that time was not as high as when you took it, but as high, say, as two days ago when Dr. Brazie took it? A. Yes.

Q. Also at that time did she say to you whether she had any headaches previous to the accident over her eyes?

A. She stated that occasionally she had headaches over her right eye.

Q. Was an electroencephalogram ever given?

A. Not to my knowledge.

Q. Wasn't that recommended by Dr. Eisenbeiss?

A. I really do not know.

Q. When you examined her did she appear to be dizzy at the time?

A. No, she was not dizzy at the time.

Q. Did you check her eyes? A. I did.

Q. What was the condition of her eyes?

A. I checked her eyes on basically what we call an ophthalmoscopic examination, which is primarily to look at the arteries, blood vessels and nerves in back of the eye, which were normal at that time.

Q. You discussed an incident, an acute episode, I believe [75] you described it of July 30th you said? A. That is correct.

(Testimony of John Finley Westfall, M.D.)

Q. Then later you said that you understood that was a week after the accident; the accident was in June, if I am not correct. I am not trying to confuse you, I am trying to get it straight.

A. Right. I agree.

Q. This episode that she had of July 30th where there was acute nausea and dizziness, I believe that is what she told you? A. Correct.

Q. After that time did you know she had been put in a hospital in Kingman, did she tell you that? I believe she entered around the 1st of August and was under observation at that time by Dr. Arnold.

A. Yes.

Q. This acute episode of July 30th which you have testified to and described the symptoms of it, do you think that episode was a result of the accident?

A. I believe that it likely was a result of the accident.

Q. You don't feel such a thing as you have termed it, "acute", wouldn't have occurred earlier than this—after all, this is over a month after the accident occurred?

A. It is more likely to have occurred earlier. You might say it also can occur at a delayed interval of time. [76]

Q. Has that been your opinion all the time as to that?

A. It has been my opinion that the accident was a factor in the cause of the acute episode.

Q. That it was a cause?

(Testimony of John Finley Westfall, M.D.)

A. That it was a factor.

Q. Now, of course, the fact that she had the hypertension before was also a cause?

A. Correct.

Q. And have you ever made the statement, Doctor, that if the accident of June 24th had caused that illness that the result would have been immediate and not delayed?

A. No, I don't recall having made such a statement.

Q. Now, this treatment that you said you started her on was mild drugs; then you said she might have to have further drugs. You said you sent that to Dr. Arnold.

A. That is correct.

Q. And at that time she was his patient, in August of '55?

A. •Correct.

Q. I believe you stated that it was possible that she might not be able to work again, is that correct?

A. Yes, I did.

Q. You heard the testimony that she has improved. Everybody that testified today said there has been some considerable—some considerable and others slight—improvement in Mrs. [77] Ferguson?

A. Yes.

Q. If that improvement would continue and the blood pressure would level out, say, at least to the same degree that it was prior to the accident, isn't it quite possible she would be able to return to work?

A. She should continue to improve, yes.

Q. Actually, the things wrong with Mrs. Fer-

(Testimony of John Finley Westfall, M.D.)

guson now are all subjective things, there is nothing objective that you can put your finger on, except the high blood pressure, which she had previous to the accident, isn't that correct?

A. I would say that is correct.

Q. It is also quite possible that Mrs. Ferguson, if she decides she wants to and they can level off this blood pressure, can return to work?

A. I would say it is possible but not probable.

Q. Then you are of the opinion the improvement won't continue?

A. I am of the opinion she may notice some further improvement. However, I would tend to doubt her improvement would be to the extent that she would be able to go back to full time work.

Q. Do you think she could do part time work?

A. I really don't know. It is a possibility.

Q. You have only seen her once, this is as a physician? [78]

A. Correct.

Q. At that time you said she showed no dizziness and her eyes were perfectly all right; actually the only real trouble was the hypertension.

A. The only thing we noted on physical examination, except for lack of alertness, which I stated I did not think was normal for a person of her age.

Q. But that has apparently improved some since the time you saw her?

A. I really don't know.

Q. Now, you said that a person that had the

(Testimony of John Finley Westfall, M.D.)

hypertension that she had could possibly live on and die of a normal disease, the normal tendency?

A. Correct.

Q. Isn't it also quite true that a person that has the hypertension like that could die from the hypertension or hypertension of that type at any time?

A. Yes.

Q. Then it would be possible to go either way there? A. Yes.

Q. You don't want to put in any probable?

A. No.

Q. Aren't there a lot of new drugs on the market today to control hypertension?

A. Yes, there are. [79]

Q. They are quite effective?

A. They are.

Q. You don't know actually what her treatment has been at all since you saw her in August of '55?

A. No, I do not.

Q. Isn't it true too, Doctor, that weight enters in quite a bit to hypertension?

A. It can, yes.

Q. Did you advise Mrs. Ferguson when you saw her that it might be helpful to her if she lost some weight?

A. I don't recall specifically if I did advise her or not.

Q. If a person of Mrs. Ferguson's height, weighs 170 pounds, wouldn't you think it would be advisable if she lost some weight?

A. Yes, I do.

(Testimony of John Finley Westfall, M.D.)

Q. And the losing of the weight might have an effect on the blood pressure reading?

A. It might.

Q. Might have a considerable effect, mightn't it?

A. In a case like Mrs. Ferguson's I doubt if weight loss would have a considerable effect on her blood pressure, possibly a minor effect.

Q. You heard she was advised to lose weight back in 1951? A. Correct. [80]

Q. And also was advised to continue the treatment at that time. Back that far when she was working, if she had continued the treatment and lost the weight as she was advised at that time, couldn't it have had considerably effect on Mrs. Ferguson?

A. It could be either way. We have skinny hypertensives and over weight ones. The weight reduction in her type of hypertension I think would have probably resulted in a slight reduction of her blood pressure.

Q. There is no doubt it would have been to her advantage? A. I would agree to that.

Q. Now, as I said, this episode occurred in July, July 30th, 1955, and also you know in between there she had gone back to work. Now, during that time you have no knowledge whether anything else happened to Mrs. Ferguson which could have caused the episode or not, do you? A. No, I do not.

Q. Anybody with the hypertension that she had, that there are many things that could have caused an episode of this type, isn't that correct?

(Testimony of John Finley Westfall, M.D.)

A. That is correct.

Q. And Mrs. Ferguson, as you know, was a woman who had apparently worked very hard and had had twelve children. Isn't it more likely that she would be susceptible to any type of thing, that any different type of the regularity might [81] affect her more than it would, say, a person that had not had twelve children and hadn't worked as hard as she had in her life?

A. I would have to say not necessarily on that.

Q. You still feel that you have never felt that the episode of July 30th would have occurred earlier if it had been caused by the accident?

A. No. I don't recall that. I would say this on that topic, you would expect it to occur at an earlier date but they can occur at a later date.

Q. Did Dr. Arnold in sending the patient to Dr. Eisenbeiss, who sent her to you, refer in any way to the episode of July 30th?

A. I had no history whatsoever available except what Mrs. Ferguson and her daughter related to me.

Miss Reimann: I believe that is all.

Redirect Examination

By Mr. Kaplan:

Q. Doctor, do you have any reason to believe that Mrs. Ferguson's symptoms were in any way exaggerated or falsified? A. I do not.

Q. Are they completely compatible with a person whose pre-existing hypertension was aggravated by an accident? A. They are. [82]

(Testimony of John Finley Westfall, M.D.)

Mr. Kaplan: That is all.

Recross-Examination

By Miss Reimann:

Q. Doctor, do I understand you then that if a person has hypertension and it is aggravated, and yet the hypertension is brought down at least to the same level as it was before the aggravation, that that person cannot become a normal person again and do the things they did before, where there are no other objective symptoms and, I might also add in that, which I think is in evidence, it shows decided improvement in the patient?

A. I say it is possible—I would say it this way: There are many instances where people can and have returned to full activity.

Miss Reimann: No further questions.

Further Redirect Examination

By Mr. Kaplan:

Q. Doctor, in your opinion, is that the case with Mrs. Ferguson?

A. I would tend to doubt it.

Mr. Kaplan: That is all.

Miss Reimann: No further questions.

The Court: Doctor, where did you get the [83] information that this occurrence of July 30th was about a week after the accident?

A. I don't recall. Perhaps that is a misinterpre-

(Testimony of John Finley Westfall, M.D.)

tation on my part, primarily because I have in my record book the date of the accident 6/24/55 and the acute episode occurred 30th of July.

Q. What is there about the accident that would bring about this acute episode?

A. It isn't so much the actual injury, it is in any person who has a basic hypertension of a rather severe nature who is put under any extreme physical, emotional stress or shock like situation will tend to notice an aggravation of their hypertension. In this case I was particularly referring to the episode which occurred on 30 July, which in my opinion was an acute vascular—in other words, blood vessel reaction in her brain which we call acute hypertensive encephalopathy, characterized by a great deal of spasm of the brain, pouring out of fluid into the brain tissue with some brain tissue damage.

Q. Is it the excitement of the shock in the accident that does that?

A. That is right. You wouldn't expect it to happen to a person with normal blood pressure.

Q. If that is what caused it, Doctor, would you look for the episode to happen in close relation to the excitement and [84] shock?

A. It is more likely to occur, we will say, in the first two weeks. Certainly I think you would say your reaction could occur anywhere within sixty days, several months.

The Court: That is all.

(Testimony of John Finley Westfall, M.D.)

Miss Reimann: I have a few more questions, if I may, your Honor.

Further Recross-Examination

By Miss Reimann:

Q. You heard the testimony today that Mrs. Ferguson went back to work a week after she was in the accident? A. Correct.

Q. And she worked for a month, and that during that time that she had a hard time doing the work and she was worried about it because she wasn't doing the work and she was having trouble with her mental processes, thinking, at that time; after that she had to give up the job because at that time she wasn't able to do the work. Isn't it true that something like that was probably a greater upset to Mrs. Ferguson than, if she couldn't do the work, would cause an episode that you described of July 30, 1955?

Mr. Kaplan: Just a minute. I object to the question, if the Court please, upon the grounds it contains more testimony than it does question. She assumes many facts which are not [85] in issue and which have not been testified to by any witness today.

The Court: I think if you want to put it on the basis of assuming thus and so it probably would be a proper question.

Miss Reimann: Let's assume that then. As I recall that was, most of it, testified to.

(Testimony of John Finley Westfall, M.D.)

A. Assuming those things to be all true I would say this, that in any hypothetical instance of that nature or even this particular case the question that would arise in my mind would be whether or not the confusion, loss of memory and other symptoms which we have been over, were as a result of an aggravated hypertension or as the result of, say, actual brain injury at the time of an accident which was not apparent, or whether it was just due to the emotional shock of an accident.

Q. (By Miss Reimann): There is no evidence, objective evidence or symptoms of actual brain damage, is that correct?

A. That is correct, there is no objective evidence.

Q. If you had run or if an electroencephalogram had been run, wouldn't that tend to show that?

A. It might show it, may not.

Q. That is very often the purpose of running one, isn't it?

A. It very often is, yes.

Q. Isn't it quite possible that Mrs. Ferguson returned to [86] work prematurely, before she was ready to, after the accident?

A. It is possible.

Q. And her working there for that period of four weeks could have been a great factor in the episode that followed later on, as you say, of July 30th?

A. I don't know how great it would be. It could be a factor.

Q. Again let me ask this: This episode of July 30th, that was told to you by Mrs. Ferguson?

(Testimony of John Finley Westfall, M.D.)

A. That is correct.

Q. You had nothing from the doctor in regard to that?

A. I did not,

Miss Reimann: I believe that is all.

Further Redirect Examination

By Mr. Kaplan:

Q. As you say, Doctor, your date might have been incorrect?

A. Correct.

Mr. Kaplan: That is all.

The Court: That is all, Doctor.

(Witness excused.)

Mr. Kaplan: If the Court please, at this time I should like to read into evidence from the American Experience Table of Mortality, which states that the life expectancy of a person fifty-five years of age is 17.40 years. [87]

Now, if the Court please, also at this time I should like to read into evidence that the present value of one dollar per annum for seventeen years, at three per cent, is 13.1661 dollars; at three and one-half per cent, is 12.6513 dollars; at four per cent, is 12.1657 dollars and at four and one-half per cent, is 11.7072 dollars.

(Plaintiffs' Exhibits 4, 5 and 6 were marked for identification.)

Mr. Kaplan: I will ask Miss Reimann if she will agree that Plaintiffs' 4, 5 and 6 are accurate pictorial representations of the automobile in which Mrs. Ferguson was riding, after the accident?

Miss Reimann: You are asking me to question?

Mr. Kaplan: No, I am asking you if you will so stipulate.

Miss Reimann: No. I will not. And before the witness is called, your Honor, I have never seen the pictures before today and as far as the accident is concerned, the liability is stipulated to. I can't see that the pictures of the car have any bearing on the case at this point, and if they do have a bearing it is going to require us possibly to put on some testimony that would make a difference in the case, and the witness I would have to put it on I don't have here at this time.

The Court: I won't rule on it until [88] something is offered.

Mr. Kaplan: You will not so stipulate?

Miss Reimann: You mean that that is the car?

Mr. Kaplan: After the accident.

Miss Reimann: I will stipulate to that.

Mr. Kaplan: If the Court please, upon the basis of stipulation as to identity we offer Plaintiffs' Exhibits 4, 5 and 6 in evidence merely for the limited purpose of displaying to the Court the severity of the impact to which Mrs. Ferguson was subjected in the accident.

The Court: May I see them, please?

Miss Reimann: Again, your Honor, I make an objection because it would then bring in the size of the Government truck involved, the speed of the Government truck involved, which certainly would make a great difference as to the way the pictures portray the accident.

The Court: Do you stipulate that this is a substantially accurate representation of the vehicle immediately after the collision?

Miss Reimann: I have no knowledge. I will take Mr. Kaplan's word for that.

The Court: You will stipulate to that?

Miss Reimann: Yes.

The Court: They may be admitted for what they are worth. [89]

(Plaintiffs' Exhibits 4, 5 and 6 admitted in evidence.)

Mr. Kaplan: If the Court please, at this time the plaintiffs rest.

DENNIS BORN, M.D.

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Miss Reimann:

Q. Will you state your name, please?

A. Dennis Born.

Q. You are a physician in Prescott?

A. I am.

Q. How long have you been a physician here?

A. Twenty-three years.

Q. And you are licensed to practice medicine in Arizona?

A. Yes.

Q. And how long have you been licensed to practice medicine, Dr. Born?

A. In Arizona, twenty-three years.

(Testimony of Dennis Born, M.D.)

Q. Have you been licensed any place else?

A. No, I have not.

Q. I wonder if you would relate to the Court your qualifications for practicing medicine as to the schools you went [90] to and training?

A. Bachelor of Science, University of Arizona; Doctor of Medicine, Rush Medical College, University of Chicago; internship in neurology, one month at Presbyterian Hospital in Chicago; six months Cedars of Lebanon in Los Angeles, Hollywood; one year L. A. County General, Los Angeles, and the balance has been private practice.

Q. In Prescott? A. Yes, and in the Army.

Q. Yours is a general practice? A. It is.

Q. Are you also a surgeon?

A. I am a Fellow of the American College of Surgeons, yes.

Q. Dr. Born, you made an examination of Mrs. Amanda Ferguson at the Government's request on June 26th of this year? A. I did.

Q. And at that time Mrs. Ferguson, I believe, came to your office, isn't that correct?

A. She did.

Q. And when you first examined her, I wonder if you will state to the Court exactly what your examination consisted of, how long it lasted, just exactly what you did?

A. She was presented to me on the table after having had her weight and height taken. [91]

Q. What was the weight and height, if you recall?

(Testimony of Dennis Born, M.D.)

A. She weighed 167 and three-quarters pounds. She was five feet four and one-quarter inches tall. I questioned her while she was seated on the table with regard to the history of her accident and so forth, which probably required a period of ten minutes. Then I gave her a general physical examination together with further questioning.

Q. What did your examination consist of?

A. Consisted of examination of her eyes, her nose, mouth, general body and blood pressure, urinalysis.

Q. I wonder if you will tell us the results of the examination you gave, say first in regard to her eyes?

A. Her eyes appeared normal. The pupils reacted to light and accommodation, the eye grounds appeared normal and there was no nystagmus or other abnormality noted.

Q. And the ears and nose?

A. The ears, the tympanum were intact and hearing was within normal limits as determined by the spoken voice. Her nose, she had good ventilation.

Q. Were there any abnormalities that you found in Mrs. Ferguson?

A. There was a slight depression of the soft tissues over the right eye, which was the site she indicated having been injured, a small laceration. There was a blood pressure of 206 over 130 at my determination. There was also minimal arteriosclerosis.

(Testimony of Dennis Born, M.D.)

Q. What else did you do in your examination or have done?

A. I examined her pelvically, heart, lungs, chest and palpation of the abdominal viscera and reflexes.

Q. How were Mrs. Ferguson's reflexes?

A. They were normal.

Q. I believe you stated you talked to her back and forth on several occasions during the examination?

A. I did.

Q. How did her thinking pattern and memory appear to you at that time?

A. She didn't appear to be at all evasive and her recollection, except for exact dates, was good.

Q. She could answer any questions you asked her?

A. Yes.

Q. There was no hesitancy in it?

A. She asked the party with her regarding specific dates is all.

Q. Aside from that there was no hesitancy?

A. No hesitancy or evasion I would say.

Q. You went into pretty thorough questioning of her as to past history and her present symptoms?

A. I did.

Q. You observed her walking at the time?

A. Yes, when she left the table and so forth. [93]

Q. How did that appear to you?

A. She appeared to walk normally and unhesitatingly.

Q. Did she need any help at all during the examination, was she able to handle her body all right?

(Testimony of Dennis Born, M.D.)

A. She did quite well, yes.

Q. Would you consider Mrs. Ferguson overweight, Doctor? A. I did.

Q. About how much?

A. I would say she is twenty-five or thirty pounds over weight.

Q. Did the weight seem to give her any trouble?

A. Not undue trouble, I wouldn't say.

Q. I believe you had some X-rays made, too, is that correct? A. I did.

Q. What did they reveal?

A. They revealed some arthritis of her spine; also an apparent old injury in the region of the third and fourth dorsal vertebrae with some angulation.

Q. Did you think that old injury, that apparent old injury would account for any of the pain she described to you?

A. She described a pain which radiated under her scapula, or shoulder blade, which could have been attributed to a lesion in this area or a neuralgia resulting from the same. [94]

Q. How long would you say you observed Mrs. Ferguson? Maybe I asked you that.

A. She was in the office I would say for a period of—that is during my observation, she was there longer than that, I would say between thirty and forty minutes.

Q. I believe you stated when you examined her, her blood pressure was 206 over 130?

A. That is correct.

(Testimony of Dennis Born, M.D.)

Q. Would you consider that, or you would consider that a high blood pressure, Dr. Born?

A. Yes.

Q. When a person comes in for an examination of this kind is it likely that the blood pressure might be a little higher at that time than it would be normally? A. It is probable, yes.

Q. You have to walk up quite a flight of steps into your office, don't you, Dr. Born?

A. Yes, if you come one way; the other they don't.

Q. You don't know which way Mrs. Ferguson came? A. I do not.

Q. Outside the high blood pressure that Mrs. Ferguson showed, did you find any other symptoms or any other objective symptoms, shall we put it, that weren't normal or average for a lady of her age who had had twelve children?

A. No, I would say not. [95]

Q. Nothing except that really showed up in your examination then?

A. That is right. Everything was consistent with her age and blood pressure.

Q. Dr. Born, are there many new drugs today or many new ways of controlling high blood pressure? A. Yes, there are.

Q. Has it in many cases been very successfully controlled? A. Yes.

Q. Do you think that Mrs. Ferguson's weight would have anything to do with her blood pressure?

A. Weight does affect blood pressure and per-

(Testimony of Dennis Born, M.D.)

sons that are overweight are more inclined to have hypertension.

Q. Would it be possible that a reduction of weight would help Mrs. Ferguson in controlling the blood pressure?

A. I would believe somewhat, I wouldn't be able to state how much.

Q. Now, Dr. Born, it was testified here today—I don't believe you heard the evidence—that in 1951, Mrs. Ferguson had a systolic blood pressure of 180 over 130; and in March of '56, it was 165 over 120; when you took it was 206 over 130. And then last Tuesday it was taken and it was 180 over 130, which was July 3rd, 1956, which is exactly the same as it was in 1951. I just give you that as a background for the question. Do you have an opinion, Dr. Born, if Mrs. Ferguson's blood [96] pressure could be controlled to a reading at least under which she previously was able to work and she worked in the capacity I guess as you know, as a cook, that if this blood pressure would be gotten to an extent it could be controlled to where it was previously, as to whether or not she would again be able to work as a cook?

Mr. Kaplan: If the Court please, I object to the question upon the ground there is no evidence in this case that the blood pressure of this lady can ever be controlled. Now, Dr. Born (Dr. Brazie) has testified of his attempt to control it and he has testified it resulted with the use of the only drugs

(Testimony of Dennis Born, M.D.)

he could find available that it still goes up and down. There is no evidence in this case that the blood pressure can ever be controlled at any one particular level at this particular time. I think the question is based on false premise and inaccurate.

The Court: I am going to let him answer the question.

A. It would be safe to assume if her blood pressure were controlled to the point where it was previously, regardless of the amount, to where she were asymptomatic she should be able to return to work.

Q. (By Miss Reimann): As a cook?

A. Yes, her previous occupation.

Q. Do you think, Dr. Born, with proper care and medication and weight control it is highly possible that Mrs. Ferguson's [97] blood pressure could be controlled to that extent, which I believe she worked with previously, 180 over 130?

Mr. Kaplan: I object to the question on the ground we are not concerned with what is highly possible, we are concerned with what is probable from a reasonable medical certainty.

The Court: No, he may answer.

A. It would be difficult to answer that question. There are cases which are difficult to control and some which are uncontrollable. However, most cases are controllable.

Q. Do you think the fact that her blood pressure last Tuesday was the same as it was in 1951 would be any indication that it is probable it could be controlled to that extent?

(Testimony of Dennis Born, M.D.)

A. I would think so, if it were identical to the original reading, yes.

Q. I believe possibly I asked you this, but there were no objective symptoms that you were able to find that was wrong with Mrs. Ferguson, outside of the high blood pressure?

A. Referable to her complaints?

Q. Yes. A. That is true.

Q. The day she was in to see you did she appear to be dizzy and confused?

A. No. And she stated she was not dizzy on that particular occasion. [98]

Miss Reimann: No further questions.

Cross-Examination

By Mr. Kaplan:

Q. Dr. Born, presumably one of the first things you asked Mrs. Ferguson when she came into your office was to relate to you what her present symptoms are, is that correct?

A. I first asked her a history of her accident and her progress since, then I asked her about her complaints.

Q. Present symptoms? A. That is right.

Q. She told you that she was weak when she walks? A. That is right.

Q. She told you she has headaches which began in the back of her neck and extend to the shoulder region? A. That is right.

Q. She told you she had nervousness manifested by lack of concentration and poor memory?

(Testimony of Dennis Born, M.D.)

A. She did.

Q. You performed all of these various tests which you previously related?

A. Yes, the usual examination.

Q. Yes. And at the conclusion of your examination, Doctor, you came to the opinion that Mrs. Ferguson was a truthful person and had told you the truth when she had [99] related her symptoms, didn't you? A. I felt so.

Q. She was not malingering or exaggerating?

A. She didn't seem at all evasive.

Q. Now, Doctor, you testified on direct examination that if Mrs. Ferguson's blood pressure can be controlled at the level at which it existed prior to the accident, and controlled to where it became asymptomatic, then you believed that Mrs. Ferguson would be able to return to work, is that correct?

A. I would assume she should be able to.

Q. That is based on the premise that her blood pressure can be controlled on a level and controlled so it can remain at the point where it was prior to the accident, is that right?

A. Yes, and to where she is asymptomatic.

Q. In other words, so that it is not causing her any loss of memory, so that it isn't causing her any weakness, general condition of weakness, and so that it isn't causing her any headaches? That is what you are saying? A. That is true.

Q. If it cannot be controlled to that level then her symptoms will continue and she will continue to be disabled, is that right, Doctor?

(Testimony of Dennis Born, M.D.)

A. I would expect them to continue if her blood pressure were not controlled. [100]

Q. Now, Doctor, is it not a medical, accepted medical fact, that persons who have hypertension and whose hypertension has been aggravated, that their blood pressure may vary up and may vary down at different intervals?

A. That is true in anyone's blood pressure.

Q. Anyone's blood pressure, right. If before an accident a person's blood pressure, is, say, 180 over 130, and then following an accident the blood pressure soars way up above that, then at times it comes down to that, then at times it may even go below that, but at other times it soars up again; and that condition of varying blood pressures occurs for a period of a year, then, Doctor, is it not true that it is not probable that that blood pressure can be controlled?

A. It depends entirely upon what has been used to control it.

Q. Let's assume that what has been used is every drug known to medical science. Do you know of any drug that can control it, Doctor?

A. Certain cases. You can control a case that won't work in another. And other cases can be controlled very simply by some of the newer drugs.

Q. Even the newest drugs will not work on some people, and the doctor has to keep experimenting until he finds a drug which will control the blood pressure of his individual patient, is that right? [101]

A. That is usually the way.

(Testimony of Dennis Born, M.D.)

Q. And sometimes you can't even find a drug in existence that will control that blood pressure, is that not true? A. That is true.

Q. So, Doctor, you have never examined Mrs. Ferguson over an extended period of time and followed her blood pressure readings over an extended period of time, have you?

A. Saw her only on a single visit.

Q. You are not familiar with her condition prior to the accident, her condition since the accident, and have not followed her blood pressure readings for an extended period of time?

A. I have not.

Q. So then, Doctor, you are not actually in a position to say with regard to Mrs. Ferguson whether or not her blood pressure will ever be controlled? A. No.

Q. And, Doctor, at the conclusion of your examination of Mrs. Ferguson it was your opinion and you so expressed that the pre-existing hypertension, Mrs. Ferguson's pre-existing hypertension could be aggravated by her injury, and that such an injury with the resultant aggravation could result in her present symptoms? A. That is true.

Q. And you expressed no other opinion in that regard? [102] A. No, that is true.

Mr. Kaplan: That is all.

(Testimony of Dennis Born, M.D.)

Redirect Examination

By Miss Reimann:

Q. Dr. Born, if a person has a blood pressure of 180 over 130 in 1951, and the next reading we have in evidence is 165 over 120, then your reading, which was 206 over 130, then one on July 3rd of 180 over 130, taking those all into consideration and realizing the conditions under which your blood pressure test was made, wouldn't you say that the control of Mrs. Ferguson's blood pressure is getting better and closer to what it was back in 1951?

A. No, I would say those were normal variations of a blood pressure of that type where the diastolic was consistently 130, I wouldn't be too concerned about the systolic pressure.

Q. Then actually you say her blood pressure to-day is not any worse than her blood pressure was back in 1951, is that correct?

A. Her diastolic pressure, apparently, with all the readings you have quoted, has varied only ten millimeters of mercury.

Q. And the one time it varied it varied down and not up from the reading in 1951?

A. That is right. [103]

Q. Taking all those into consideration, again I ask you with proper care and medication and weight control do you feel Mrs. Ferguson's blood pressure can be leveled out on a control?

Mr. Kaplan: If the Court please, this is a ques-

(Testimony of Dennis Born, M.D.)

tion which directly repeats a question which I asked the doctor and in which he said he couldn't express an opinion with regard to Mrs. Ferguson, as to whether or not her blood pressure could ever be controlled.

The Court: I will let him answer it. I take it by "do you feel," do you have an opinion?

Miss Reimann: Yes, sir.

A. In most cases we would expect it to level off; in her particular case I don't believe anyone could make a definite statement.

The Court: In other words, you are saying, Doctor, you couldn't be positive of it; you have an opinion it can be?

A. That is true. In most cases you can control.

Q. (By Miss Reimann): It was your testimony if it were so controlled you feel she could go back to gainful employment again?

A. I would say so.

Miss Reimann: No further questions.

Recross-Examination

By Mr. Kaplan: [104]

Q. If it were so controlled that she had no other symptoms than she presently has?

A. If she was asymptomatic from her blood pressure I would say there was no reason she couldn't return to work.

Mr. Kaplan: That is all.

(Testimony of Dennis Born, M.D.)

Further Redirect Examination

By Miss Reimann:

Q. From your observation of Mrs. Ferguson in regard to her thinking capacity, the way she answered you, as to dizziness, as to her eyes, anything like that, there was nothing that you could find, or nothing that was shown to you that would show that she couldn't think properly, that she was dizzy, that her eyes didn't focus properly, besides what she said to you, is that correct?

A. That is true. She also stated that on that particular day she had no dizziness and it was one of her good days.

Miss Reimann: No further questions.

Mr. Kaplan: No further questions.

The Court: Doctor, let me ask you one question. They haven't gone into it, but you, I believe, expressed an opinion that this accident in June of 1955, could possibly have been a precipitating factor in the disabling symptoms that Mrs. Ferguson has now. I believe that is what counsel asked you, if you didn't at the end of your examination [105] express that?

A. It is possible that could have aggravated it and brought on her present symptoms.

Q. Let me ask you, Doctor, if the disabling symptoms were to arise or show up something over a month after the accident, would that in any man-

(Testimony of Dennis Born, M.D.)

ner affect your opinion or cause you to have any difference in your opinion?

A. Well, I would say the effect on the blood pressure would possibly have been more emotional than from any actual injury to her system. In other words, it would be more of a result of an emotional instability or worry or concern or excitement at a particular time it affected her and that you would expect to come on within a week or two following the injury or event.

Q. In other words, the postponement of those disabling symptoms for over a month afterwards, would it in your opinion lessen the likelihood it was precipitated by the accident?

A. It could build up from the original shock or emotional upset over a period of some time and in the person's concern about their well being.

The Court: Thank you.

Redirect Examination

By Miss Reimann: [106]

Q. Doctor, could the person's concern—first I will give you some background. After the accident the testimony is that Mrs. Ferguson went back to work within a week, and that she worked for four weeks and then had to quit because she couldn't carry on with her work. And that this episode occurred on July 30th, which was after she got off work or had to quit work. Would the fact she wasn't able to carry on her work and had to give up her

(Testimony of Dennis Born, M.D.)

job at that time also have been a factor, or could have been the factor or caused this particular episode of July 30th when there was extreme apparent dizziness or nausea at that time?

A. It is possible that could have been a great factor, yes.

Q. Could have been a great factor?

A. Yes, anything that would disturb a person very much would affect their blood pressure.

Q. Isn't it true that if the accident were the cause of this it would have been more likely to happen at a date more closely to the date of the accident than after she had gone back to work and worked for four weeks and had to give up her work?

Mr. Kaplan: If the Court please, the testimony in this case is that this lady was troubled with these symptoms all during the time she tried to work and she finally saw she couldn't work any longer. I don't know what Miss Reimann [107] is building up to, but she would make it appear that this lady was perfectly normal until all of a sudden at the end of four or five weeks then this whole thing came on, which is not the evidence.

The Court: I will permit the witness to answer.

The Witness: Will you repeat the question?

(The last question was read.)

A. I would say the symptoms could come on at any time immediately following an accident to a period up to two or three months even. And the time factor would not be too important.

(Testimony of Dennis Born, M.D.)

Q. (By Miss Reimann): Dr. Born, if a person has a blood pressure of 180 over 130 and has had it for several years, could anything upset her enough that it would cause these symptoms, would it take a big thing or a small thing, or can you answer that question?

A. I am afraid that would be almost impossible to answer. Some people with even greater hypertension than she has have no symptoms and others with less have symptoms.

Miss Reimann: No further questions.

Mr. Kaplan: No further questions.

The Court: That is all, Doctor.

(Witness excused.)

Miss Reimann: The Government rests, your Honor.

Mr. Kaplan: We have no rebuttal, your Honor.

The Court: Do counsel want to argue the matter now?

Mr. Kaplan: If the Court please, I appreciate a matter tried to the Court such as this and extensive argument is not called for. But I might make a brief statement based on the testimony as it has appeared here.

The liability is admitted and of course that is out of the case and the question is how much have Mr. and Mrs. Ferguson been damaged by reason of the accident.

(Argument by counsel.)

The Court: Is Dr. Arnold available?

Mr. Kaplan: Dr. Arnold is available if we should have him leave Kingman with no other doctors around. That was the reason we didn't call Dr. Arnold.

The Court: I want to look at the exhibits and check my notes. It will be taken under advisement and I will rule on it in a few days. [109]

Reporter's Certificate

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter, I attended the hearing in the foregoing entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 109 pages of typewritten matter contain a partial true and correct transcript of my shorthand notes taken by me as aforesaid.

Witness my hand this 22nd day of August, 1956.

/s/ FRED L. BAKER,
Official Court Reporter.

[Endorsed]: Filed August 28, 1956. [110]

[Title of District Court and Cause.]

Certificate of Clerk

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Edward A. Ferguson, et ux, Plaintiffs, versus United States of America, Defendant, numbered Civ-452 Prescott, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries and docket entry of July 9, 1956, are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute and docket entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case, and the same are as follows: to wit:

1. Plaintiffs' Amended Complaint.
2. Answer of Defendant United States of America.
3. Defendant's Interrogatories to Plaintiffs.

4. Plaintiffs' Answer to Interrogatories
5. Plaintiffs' Request for Admissions.
6. Defendant's Answers to Plaintiffs' Request for Admissions.
7. Minute entry of July 6, 1956 (Proceedings of trial).
8. Minute entry of July 9, 1956 (Order for judgment, and directing Clerk to enter judgment for plaintiffs).
9. Civil Docket Entry of July 9, 1956 (Clerk's notation of entry of judgment in civil docket under Rule 79 (a)).
10. Plaintiff's Motion to Alter or Amend Judgment, or in the alternative, for a new trial.
11. Minute entry of July 13, 1956 (Order for submission of proposed findings of fact and conclusions of law).
12. Plaintiffs' Proposed Findings of Fact and Conclusions of Law.
13. Findings of Fact and Conclusions of Law filed July 19, 1956 (being the same document as No. 12 above).
14. Plaintiffs' Motion to Amend Findings of Fact.
15. Minute entry of August 13, 1956 (Order denying motion to alter or amend judgment or for new trial and motion to amend findings), docketed August 13, 1956.
16. Plaintiffs' Notice of Appeal.
17. Plaintiffs' Bond on Appeal.
18. Plaintiffs' Designation of Record on Appeal.
19. Reporter's Transcript of Proceedings.

I further certify that all original exhibits admitted in evidence are transmitted herewith as a part of this record on appeal, to wit:

Plaintiffs' exhibits 1 to 6 inclusive.

Witness my hand and the seal of said Court this 27th day of September, 1956.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15320. United States Court of Appeals for the Ninth Circuit. Edward A. Ferguson and Amanda Ferguson, Husband and Wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: September 29, 1956.

Docketed: October 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
Ninth Circuit

No. 15320

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Appellants above named hereby make the following statement of points upon which they intend to rely in the above appeal:

1. Findings of Fact No. 4, insofar as it finds that the aggravation of Amanda Ferguson's pre-existing hypertensive heart condition caused only temporary total disability, is clearly erroneous in that there is no credible evidence to support said finding and it is contrary to the uncontradicted evidence that her condition was aggravated to the extent that she is permanently disabled.

2. Findings of Fact No. 5 (a) is clearly erroneous in that there is no evidence to support said finding and it is contrary to the uncontradicted evidence that Mrs. Ferguson had been deprived of \$3,300.00 in earnings at the time of the trial.

3. Finding of Fact No. 5 (b) is clearly erroneous in that there is no evidence to support said find-

ing, and it is contrary to the evidence that Mrs. Ferguson, at the time of the accident, was earning, and is now capable of earning, \$66.00 per week and that she is permanently disabled.

4. Finding of Fact No. 5 (c) is clearly erroneous in that said sum is grossly inadequate in view of the uncontradicted evidence as to the nature and extent of the injuries sustained by Mrs. Ferguson and their effect upon her and in view of the findings made by the trial court.

5. Conclusion of Law No. II is erroneous in that it is based upon the erroneous findings hereinabove specified.

6. The judgment is grossly inadequate, is not justified by the evidence and is contrary to law.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed October 8, 1956.

No. 15,320

In the

United States Court of Appeals

For the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Opening Brief

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FILED

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PAUL P. O'BRIEN, CL



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Appellants,

VS.

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Appellee.

Appellants' Opening Brief

JURISDICTION

Appellants brought this action to recover damages for personal injuries caused by the negligence of a member of the United States Air Force while acting within the scope of his office or employment. The jurisdiction of the District Court was invoked under the Federal Tort Claims Act, Aug. 1, 1947, ch. 446, 61 Stat. 722; 28 U.S.C.A. § 1346 (b). The complaint alleged that the jurisdiction of the District Court arose under the Federal Tort Claims Act, and that on or about June 24, 1955, Francis Maka, a member of the United States Air Force, while acting within the scope of his office or employment, carelessly, recklessly and negligently drove a Government truck, causing it to collide with an automobile

in which Appellant Amanda Ferguson was a passenger. (R. 3-4) The answer admitted all of these allegations with the exception that it denied the Government truck was driven carelessly, recklessly and negligently. (R. 6)

The Findings of Fact of the District Court confirmed the jurisdictional allegations. (R. 28-29) The final judgment of the District Court was entered on July 9, 1956. (R. 18-19) On July 12, 1956, Appellants filed a motion to alter or amend the judgment or in the alternative for a new trial. (R. 19-27) The motion was denied on August 13, 1956. (R. 31) Appellants' Notice of Appeal was filed on August 21, 1956. (R. 31-32) The jurisdiction of this Court is invoked under Act June 25, 1948, ch. 646, 62 Stat. 929; 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On June 24, 1955 Appellant Amanda Ferguson accompanied her daughter, Mrs. Estelle Hopkins, to a residence on the corner of Topeka Street and South Fifth Avenue in Kingman, Arizona. (R. 37, 61) Mrs. Hopkins parked her car on the shoulder of Topeka Street, entirely off the pavement. (R. 11, 14, 28-29) When they finished their business, they came out and entered Mrs. Hopkins' car. (R. 37)

Just after the two ladies got into the car an Air Force truck, driven by a United States airman, ran off Topeka Street, collided with a car parked ahead and then crashed into Mrs. Hopkins' car with severe force. (R. 3-4, 6, 11-14, 28-29, 37, 61; Exhibits 4, 5 and 6)

The United States of America (hereinafter called "Government") admits liability for the collision and the injuries and damages caused thereby. (R. 29, 35)

As a result of the collision Mrs. Ferguson received cuts over the right eye and on the arms, bruises on both knees and the right leg, a contusion of the right hip, an injury to the left shoulder girdle and moderate cerebral concussion. (R. 37-38; Exhibit 2) She was taken by ambulance to Mohave General Hospital where she was attended by Dr. A. A. Arnold of Kingman. (R. 38)

Dr. Arnold placed stitches in the cut over Mrs. Ferguson's eye and committed her to bed. She remained in the hospital two days and was then permitted to go home. (R. 38; Exhibit 2) She remained at home for a week, then went back to her job as cook for the Casa Linda Cafe in Kingman. (R. 38, 41, 48)

Before the collision Mrs. Ferguson had been in general good health. In April of 1951 she consulted Dr. Walter Brazie of Kingman, her family physician, for treatment for flu. Dr. Brazie happened to take her blood pressure at that time and found that it was a little high. He gave her three treatments to reduce the blood pressure and continued to see Mrs. Ferguson on an average of once a year. (R. 40, 54-55, 67-69, 78, 85) Even though she had high blood pressure, Mrs. Ferguson was never troubled by it and her condition was in no way disabling. (R. 51, 54-55, 68, 89) She had very little trouble with headaches and she was never troubled with loss of memory, dizziness, disturbed vision, general weakness or extreme nervousness. (R. 40-41, 45-46, 62-63)

Mrs. Ferguson had been working as a cook at the Casa Linda Cafe for almost five years at the time of the collision. (R. 39-40, 56-57) The first two years she was the fry cook, then she became the dinner cook. (R. 57) As dinner cook her duties required that she work three hours on the grill, do

the baking, prepare the menu, prepare the dinner and keep the supplies up. (R. 39, 57) The cafe has a capacity of 62 persons. (R. 57) Mrs. Ferguson was on a six-day week and her work was very satisfactory. (R. 57, 58) During the almost five years of her employment she had missed work because of illness on only two occasions—she was off work four days in 1954 because of a cold and a few days in 1955 because of the flu. (R. 39, 40, 58, 76)

In addition to her work at the cafe Mrs. Ferguson performed most of the housework in her home. (R. 55)

When Mrs. Ferguson returned to her job following the collision she tried for four weeks to perform her work. (R. 48, 53) During that time she suffered constant headaches, impaired memory and weakness. She was slow in her work and could not perform it without assistance. (R. 41, 58-59) Then, on July 30, 1955, she was stricken with an attack of nausea, visual disturbance, dizziness, intractable headaches and mental confusion—almost a state of collapse. (R. 42, 63, 93; Exhibit 1)

Dr. Arnold immediately placed Mrs. Ferguson in the hospital where she remained for four days. (R. 42) Dr. Arnold believed she was suffering from a post concussion syndrome (Exhibit 1) and suggested that she see Dr. John Eisenbeiss, a neuro-surgeon in Phoenix, Arizona. (R. 42, 51) Dr. Eisenbeiss examined Mrs. Ferguson and referred her to Dr. John Westfall, a specialist in internal medicine. (R. 42-43, 51, 90, 91) Dr. Westfall examined Mrs. Ferguson on August 23, 1955 and started her on a mild drug. (R. 92, 94)

When she returned to Kingman, Mrs. Ferguson saw Dr. Arnold once and then submitted herself again to the care of Dr. Brazie. Dr. Brazie saw her on September 26, 1955 and has continued to see her every two weeks since. (R. 43, 53, 69, 70)

Even now Mrs. Ferguson continues to suffer from disturbed memory, weakness, dizziness and extreme nervousness. (R. 38, 44-46, 62-63, 71-72, 87) Objectively, her reactions are not as quick as they were before; she is more sluggish and slow moving. (R. 77)

Except for the brief, four-week period soon after the collision, Mrs. Ferguson has never been able to return to her employment. (R. 41, 45) She now can perform only her light housework and her husband must do the rest. (R. 52-53, 55-56) She is only 55 years of age. (R. 41, 56)

At the time of the collision Mrs. Ferguson was earning \$66.00 per week. (R. 40, 49, 58) She was the sole means of support for herself and her husband. (R. 40) She is not trained or educated to perform any kind of work, other than cook, for the purpose of earning a living. (R. 40)

Mrs. Ferguson has sustained damage to her nervous tissue. (R. 83-84) She has a permanent scar over the right eyebrow. (R. 29, 37-38)

The collision and resulting injuries to Mrs. Ferguson aggravated her previously dormant heart condition and brought about the symptoms from which she now suffers. (R. 29, 71-72, 88, 96) Those symptoms are disabling. (R. 29, 72)

Dr. Brazie, the family physician, and Dr. Westfall, the specialist, in their qualified medical opinions, state that Mrs. Ferguson's disabling symptoms are now stationary and that Mrs. Ferguson will never again be able to return to a gainful occupation. (R. 72, 80-81, 83, 96, 101, 105) Dr. Dennis Born, a general practitioner who examined Mrs. Ferguson on one occasion at the request of the Government, testified that if Mrs. Ferguson's blood pressure could be controlled to where she was free of all symptoms, she could

then return to work, and in most cases the blood pressure can be controlled. (R. 118, 124)

The main question presented is whether Mrs. Ferguson's disabling condition is permanent. The Government, in the answer, denies that it is. (R. 5, 6) Another question is whether \$1,000.00 is a fair and reasonable sum for pain and suffering. The third question is whether Mrs. Ferguson was earning \$60.00 per week or \$66.00 per week. The latter two questions were raised by Appellants' Motion to Alter or Amend Judgment or in the Alternative for a New Trial (R. 19) and Motion to Amend Findings of Fact. (R. 30)

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making the following portion of Finding of Fact No. 4 (R. 29):

“ * * * Amanda Ferguson's pre-existing hypertensive heart condition was aggravated to the extent that it caused temporary total disability.”

for the reason that the evidence was uncontradicted that Mrs. Ferguson's disability is permanent, and there is no sufficient evidence to support a finding that it is only temporary.

2. In making Finding of Fact No. 5(a) (R. 29), that Appellants have been damaged by reason of loss of earnings in the sum of \$3,000.00, for the reason that said finding is based on the erroneous assumption that Mrs. Ferguson was earning only \$60.00 per week, when the evidence is uncontradicted that she was earning \$66.00 per week.

3. In making Finding of Fact No. 5(b) (R. 29), that Appellants have been damaged by reason of loss of future

earnings in the sum of \$6,000.00, for the reason that said finding assumes that Mrs. Ferguson is only temporarily totally disabled, when the evidence is uncontradicted that her disability is permanent, and said finding also assumes that Mrs. Ferguson will be totally disabled for approximately two years in the future, when there is no sufficient evidence to support said finding.

4. In making Finding of Fact No. 5(c) (R. 29) that Appellants were damaged by reason of pain and suffering in the sum of \$1,000.00, for the reason that said sum is grossly inadequate under the evidence as to the condition suffered by Mrs. Ferguson since the collision, the condition now suffered by her, the condition she will suffer in the future and the permanent, disfiguring scar.

SUMMARY OF ARGUMENT

The evidence was uncontradicted that Mrs. Ferguson is permanently disabled. There was no sufficient evidence to support the findings made by the trial court that Mrs. Ferguson is only temporarily disabled, and that her disability will continue for approximately two years. Hence, said findings are clearly erroneous. Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

The evidence was uncontradicted that Mrs. Ferguson was deprived of \$3,300.00 in earnings to the time of trial. The finding that she lost only \$3,000.00 is therefore clearly erroneous.

Where the uncontradicted evidence shows that Mrs. Ferguson received multiple injuries as a result of the collision, that she has a permanent, conspicuous scar on her forehead as a result of said injuries, that for more than a year she has suffered from headaches, impaired memory, weakness,

extreme nervousness and other symptoms, all as a result of the collision, and that the symptoms are permanent, the sum of \$1,000.00 for paid and suffering, both past and future, is grossly inadequate.

ARGUMENT

I. The Evidence Was Uncontradicted That Mrs. Ferguson's Disability Is Permanent.

The trial court found, in accordance with the uncontradicted evidence, that the collision of June 24, 1955 aggravated Mrs. Ferguson's previously dormant hypertensive heart condition and brought about her present, disabling symptoms. Clearly, therefore, Appellants are entitled to be compensated for her disability. *Hartford Acc. & Indem. Co. v. Industrial Commission*, 38 Ariz. 307, 299 Pac. 1026, 1028; *United States v. Fotopulos*, 9 Cir., 180 F.2d 631, 640; 15 *Am. Jur., Damages*, Sec. 81, p. 490. As the Arizona Supreme Court so aptly said, "The law extends its protection to the afflicted as well as the healthy and strong." *Kalaf v. Assyd*, 60 Ariz. 33, 130 P.2d 1036, 1037.

Dr. Brazie has attended Mrs. Ferguson and has seen her every two weeks since September 26, 1955, a period of over nine months to the time of trial. During that time Dr. Brazie has treated Mrs. Ferguson with all the ordinary drugs for hypertension, he has shifted from one to the other, he has used combinations and he has given her intensive treatment with the newer drugs—all in an effort to control her blood pressure—without success. (R. 71, 73, 81) In Dr. Brazie's opinion, which is obviously well-qualified, Mrs. Ferguson's disability, which was brought on by the collision, is permanent.

Dr. John Westfall, a specialist in internal medicine, is likewise of the opinion that Mrs. Ferguson's disability is permanent.

Despite the testimony of these two, well-qualified physicians, the trial court found that Mrs. Ferguson's disability was only temporary. Furthermore, by awarding \$6,000.00 for loss of future earnings, the trial court found that Mrs. Ferguson's disability would continue for a little less than two years (at \$60.00 per week). These findings are without support in the evidence and are therefore clearly erroneous. Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

The erroneous findings could have been based only on the testimony of Dr. Dennis Born, who is not a specialist and who observed Mrs. Ferguson on only one occasion for between 30 and 40 minutes. (R. 115) Yet even Dr. Born did not testify that in his opinion Mrs. Ferguson's disability was only temporary. All Dr. Born said was that if Mrs. Ferguson's blood pressure could be controlled to where she was free of symptoms, then she could return to work. (R. 118, 120, 124) But when he was asked if in his opinion Mrs. Ferguson's blood pressure could be controlled, Dr. Born said, "There are cases which are difficult to control and some which are uncontrollable. However, most cases are controllable." (R. 118, 120) Dr. Born quite truthfully admitted that he was not familiar with Mrs. Ferguson's condition prior to the accident or her condition since the accident, and he did not follow her blood pressure readings for an extended period of time, so he was not in a position to say whether or not Mrs. Ferguson's blood pressure will ever be controlled. (R. 122)

In substance, therefore, Dr. Born merely testified that he didn't know whether or not Mrs. Ferguson's blood pressure could be controlled; most cases are controllable, and if Mrs. Ferguson's is ever controlled, then she can return to work. We respectfully urge that under no sensible view of the evidence does this testimony contradict the testimony of

Dr. Brazie (who for more than nine months has done everything to control Mrs. Ferguson's blood pressure) and Dr Westfall (who is a specialist in these matters) that her blood pressure cannot be controlled and her disability is permanent.

By indulging Dr. Born's testimony with the greatest conceivable weight, one might infer that in his opinion it is possible that Mrs. Ferguson's blood pressure might be controlled. Even if this inference were indulged, however, it falls far short of the required evidence. Expert testimony regarding future consequences of an injury or the permanency thereof must be in terms of the certain or probable, and not merely the possible. 20 *Am. Jur., Evidence*, Sec. 863, p. 725; *Hartford Acc. & Indem. Co. v. Industrial Commission*, supra, 299 Pac. 1026, 1028.

Though \$6,000.00 was awarded for loss of future earnings, there is not the slightest evidence to justify a finding as to what period of time in the future, if not permanently, Mrs. Ferguson will continue to be disabled. Appellants can only conclude that the trial court substituted its own opinions for those of the physicians. In *Guarantee Ins. Co. v. Industrial Acc. Commission*, 88 Cal. App. 2d 410, 199 P.2d 12, 14, the proper rule is stated as follows:

"We are satisfied this case falls within the established rule that when the diagnosis of a physical condition depends essentially upon the knowledge, skill and experience of medical expert witnesses, and is not within the common knowledge of non-expert laymen, the evidence of such medical experts is conclusive upon that issue. * * *"

The evidence of the medical experts in this case conclusively established that Mrs. Ferguson is permanently disabled.

II. Mrs. Ferguson Lost \$3,300.00 in Earnings to the Time of Trial.

It was uncontradicted that in her employment Mrs. Ferguson worked a six-day week for which she received \$60.00 plus a \$6.00 board allowance—a total of \$66.00 per week. (R. 40, 49, 58) She worked four weeks of the fifty-four that had elapsed to the time of trial. (R. 48, 53)

Consequently, as a result of the collision Mrs. Ferguson was deprived of \$3,300.00 in earnings to the time of trial. The finding made by the trial court that she lost only \$3,000.00 is based on the assumption that Mrs. Ferguson earned only \$60.00 per week and is, therefore, clearly erroneous.

III. The Award of \$1,000.00 for Pain and Suffering Is Grossly Inadequate.

Aside from the aggravation of her previously dormant heart condition, Mrs. Ferguson sustained cuts over the right eyebrow and on the arms, bruises on both knees and the right leg, a contusion of the right hip, an injury to the left shoulder girdle and moderate cerebral concussion. The cut over the right eye has left a scar which is conspicuous and permanent. There has been damage to her nervous tissue.

For several weeks following the collision Mrs. Ferguson suffered constant headaches, impaired memory and weakness. Then she was stricken with an attack of nausea, visual disturbance, dizziness, intractable headaches and mental confusion, for which she was placed in the hospital the second time.

At the present time Mrs. Ferguson continues to suffer from disturbed memory, weakness, dizziness and extreme nervousness. She cannot work, she cannot perform her normal household duties and she cannot enjoy the company of her children and grandchildren as she did before the collision. (R. 45-46, 62-63) Her present condition is permanent.

For pain and suffering, both past and future, the trial court awarded \$1,000.00. It is well-settled that a plaintiff who suffers an inadequate award is as much entitled to relief as a defendant who suffers an excessive one. Secs. 21-1301 and 21-1403 *Arizona Code 1939*; 15 *Am. Jur., Damages*, Sec. 231, p. 663.

Appellants do not seek sympathy money. They are aware that no sum of money will restore Mrs. Ferguson to her former condition. But Appellants do believe they are entitled to a fair and reasonable award, and the sum of \$1,000.00 can hardly be called fair or reasonable. By any standards the award of \$1,000.00 for pain and suffering is grossly inadequate.

CONCLUSION

The questions raised on this appeal require an objective appraisal of the evidence. Clearly there is no sufficient evidence to support findings that Mrs. Ferguson is only temporarily disabled and that her disability will continue for approximately two years. It is also apparent that Mrs. Ferguson was deprived of \$3,300.00 in earnings to the time of trial, and that \$1,000.00 for pain and suffering, both past and future, is grossly inadequate. We submit that upon an objective appraisal of the evidence, this Court should be left with a definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.* 68 S.Ct. 525, 333 U.S. 364, 92 L.Ed. 746; *United States v. Oregon State Medical Society*, 72 S.Ct. 690, 343 U.S. 326, 96 L.Ed. 978.

Appellants urge the Court to reverse the erroneous findings, together with the judgment entered thereon, with

directions to enter judgment in accordance with a determination by this Court that Mrs. Ferguson is permanently disabled, that she lost \$3,300.00 in earnings to the time of trial, and that \$1,000.00 for pain and suffering is grossly inadequate. 28 U.S.C.A. § 2106.

Respectfully submitted,

MOORE & ROMLEY

By JARRIL F. KAPLAN

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BRIEF FOR THE APPELLEE

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FILE

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PAUL P. O'BRIEN,

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BRIEF FOR THE APPELLEE

JURISDICTION

The Appellants brought this action in the District Court to recover damages for personal injuries caused by a member of the United States Air Force while acting within the scope of his employment pursuant to Federal Tort Claims Act, August 1, 1947, ch. 446, 61 Stat. 722, 28 U.S.C.A. 1346(b) and appeal from the Findings of Fact of the District Court, numbers 4, 5(a), 5(b) and 5(c) (R. 29). The jurisdiction of this appeal lies in the Act of June 25, 1948, ch. 646, 62 Stat. 929; 28 U.S.C.A. 1291.

STATEMENT OF FACTS

On June 26, 1955, Appellant Amanda Ferguson was sitting as a passenger in an automobile. The automobile was parked off the pavement of Topeka Street in Kingman, Arizona. While she was sitting there a truck belonging to the United States Air Force and driven by a member thereof in the scope of his employment, ran off the roadway and into the parked automobile. (R. 37.)

The United States of America admits liability for the collision and the injuries and damages caused thereby. (R. 29.)

As a result of the accident Mrs. Ferguson received a moderate cerebral concussion, laceration above the right eyebrow, laceration on the right arm and an injury to the left shoulder (R. 37-38, Ex. 2), and a preexisting hypertensive heart condition was aggravated.

Mrs. Ferguson was taken to the Mohave General Hospital, Kingman, Arizona, where she remained for two days before she was permitted to go home by Dr. Arthur A. Arnold of Kingman, Arizona, her attending physician. (R. 38, Ex. 2.) She remained at home for approximately one week after which time she returned to her job as cook at the Casa Linda Cafe in Kingman (R. 38) where she had been employed for the past five years. (R. 39-40.)

Mrs. Ferguson worked for about four weeks at the cafe (R. 48) before she was forced to stop.

On July 30, 1955, after an attack (R. 42) Dr. Arnold again placed her in the hospital where she remained for four days. (R. 42.) Dr. Arnold sent Mrs. Ferguson to see Dr. John Eisenbeiss, a neuro-surgeon in Phoenix (R. 42-43), who in turn referred her to Dr. John Westfall, a specialist in internal medicine. (R. 42, 43, 51.) Dr. Westfall examined Mrs. Ferguson on August 23, 1955, and Dr. Westfall report-

ed his findings to Dr. Arnold. On September 26, 1955, three months after the accident, Mrs. Ferguson consulted Dr. Walter Brazie of Kingman, Arizona (R. 53), and saw him on an average of once every two weeks until time of trial.

Dr. Ernest A. Born, a physician in Prescott, Arizona, examined Mrs. Ferguson on June 26, 1955, at the request of the Government. (R. 112.)

In May, 1951, prior to the collision, Mrs. Ferguson had been treated for high blood pressure by Dr. Brazie. (R. 73-75.) At this time he saw her on three occasions after which she failed to return for additional treatments (R. 89) even though he advised same. Mrs. Ferguson's blood pressure was the same on Tuesday prior to the trial date as it was in 1951. (R. 73.)

Mrs. Ferguson is married, 55 years of age and a mother of 10 children.

Appellants' Statement of the Case went into further detail concerning the testimony of various witnesses at the trial. These matters will be treated in this brief under Argument.

ARGUMENT I.

The Appellee does not agree with the Appellants that the evidence was uncontradicted that Mrs. Ferguson's disability is permanent. The Appellants are apparently taking the position that there was no variance in the evidence and that the trial court must accept the testimony of the Appellants' experts in the best light for the Appellants and ignore the testimony of the Appellee's expert, and in addition, ignore the fact that the Appellant herself testified at length and was closely observed by the Court and ignore the testimony of the other witnesses.

It appears from the outset that Dr. Arthur Arnold, the physician most familiar and qualified to testify to the injuries

and effects thereof of the Appellant, was not present at the trial although he was available. (R. 129.) Dr. Arnold treated the Appellant at the time of the accident and for three months thereafter. He was her physician at the time of the purported acute attack of July 30, 1955 (R. 42, 43), and sent her to Phoenix for an examination by Dr. John Eisenbeiss, a neurosurgeon. (R. 42.)

As shown by the evidence, Dr. Walter Brazie's testimony was based almost entirely on the history given him by Mrs. Ferguson. (R. 79.) Dr. Brazie stated that he had not seen the hospital reports and had not discussed the case with Dr. Arnold, nor did he do any clinical work other than the taking of Mrs. Ferguson's blood pressure and a urinalysis. (R. 79.) This case would certainly not fall in the limited group of cases which depend essentially upon the knowledge and skill of medical experts, as stated in the case of *Guarantee Insurance Company vs. Industrial Accident Commission*, 88 Cal. App. 2d 410, 199 P. 2d 12, 14, referred to on page 10 of Appellants' Brief.

In *City of Phoenix, et al. vs. Mullen*, 65 Ariz. 83, 174 P. 2d 422 at page 425, the judge instructed the jury that it would be entitled to take into consideration "the nature and extent of the injuries, if any, as a result of the accident in question, whether or not said injuries are temporary or permanent in character." The Arizona Supreme Court stated "Whether or not the said injuries are permanent need not be proven by medical testimony, nor is the jury bound by the testimony of a medical expert who testifies as to the lack of permanency of the injury if there is controverting evidence or testimony from which it may be inferred that the injury is in fact permanent." Also cited in *May vs. Ferrell*, 94 Cal. App. 703, 271 P. 789; *Hecken vs. Union Cab*, 134 Ore. 385, 293 P. 726; *Bach vs. C. Swanston and Son*, 105 Cal. App. 72, 286 P. 1097.

Also in the case of *Joan Hirsh and David Hirsh vs. Helen I. Manley*, 81 Ariz. 74, 300 Pac. 2d 588 at 594, the Arizona Supreme Court cites the case of *Hecken vs. Union Cab. Co.*, 134 Ore. 385, 293 P. 726, in which the Oregon Supreme Court faced with subjective complaints and the absence of corroborative medical testimony as to the permanency of the injuries and the probability of future pain and suffering concluded nevertheless the facts justified the presentation of such questions to the jury.

If we were to follow the Appellants' theory the juries in the above cited cases would have been required to accept the evidence of the experts.

In questioning Dr. Brazie regarding Mrs. Ferguson's hypertension he stated that her blood pressure was the same on Tuesday prior to the trial as it was in 1951 when he treated her for high blood pressure. (R. 73.) He went on to say that in 1951 Mrs. Ferguson had failed to continue treatment and medication to control her blood pressure, although he had recommended that she continue treatment. (R. 88.) He felt that Mrs. Ferguson could now do light house work and possibly do baby sitting (R. 81) and that in every respect she is better than she was in September, 1955. (R. 83.) Apparently Dr. Brazie felt that some nervous tissue had been damaged but stated that he had no tests run to prove this diagnosis and he had not inquired from Dr. John Eisenbeiss, the neurosurgeon, who examined Mrs. Ferguson as to his findings in this matter. (R. 84-79.) Dr. Brazie stated that there had been no material change in her blood pressure since 1951. (R. 81.)

On August 23, 1955, Dr. John Westfall, a specialist in internal medicine, examined Mrs. Ferguson at the request of Dr. John Eisenbeiss. (R. 91.) After a complete physical examination (R. 93) Dr. Westfall found that Mrs. Ferguson had hypertension. (R. 98.) He said she stated that she had a few headaches over the right eye but at the time of the

examination she had no dizziness and an examination of her eyes showed that they were normal. (R. 98.) It was his opinion that it was possible, but not probable, that Mrs. Ferguson could return to her former occupation (R. 101) and further that there was a possibility that she could do part time work. (R. 101.) He further testified that in many cases persons with an aggravated blood pressure have returned to full activity if the blood pressure is controlled to the same level as before the aggravation. (R. 105.)

Mrs. Ferguson, at the request of the Government, was examined by Dr. Ernest A. Born on June 26, 1956. He testified that at the time of the examination that her eyes, ears, nose and reflexes appeared normal (R. 113); that there was no hesitancy in answering questions and that she walked normally and unhesitantly. (R. 114.) In fact he, too, found no objective symptoms except high blood pressure.

He stated it was safe to assume that if Mrs. Ferguson's blood pressure was controlled to the point it had been previously, regardless of the amount, to where she were asymptomatic, she should be able to return to her previous occupation. (R. 118.) That most cases of high blood pressure are controllable (R. 118) and the fact that her high blood pressure, taken two days previous, is the same as it was in 1951 would indicate that it is probable that it can be controlled. (R. 119, 124.) Testimony of a physician as to proportion of persons with the plaintiff's affliction who ultimately recover their health is competent on this point. 25 C.J.S. Damages, Sec. 149, p. 800.

Certainly the fact that Dr. Born was not as dogmatic as the Appellants' experts is no reason to disregard his testimony.

In the case of *Southwestern Freight Lines, Ltd. et al. vs. Floyd*, 58 Ariz. 249, 119 P. 2d 120 at 127, the court states:

"That a doctor refuses to state positively the results of an injury upon the life of the injured person but, rather, chooses to prognosticate the possibilities of such injury does not weaken its worth or reliability, but commends it."

Mrs. Clara Osterman, Mrs. Ferguson's former employer, testified that Mrs. Ferguson appears better now than when she returned to work in July, 1955. (R. 60.) Mrs. Estelle Hopkins, daughter of Mrs. Ferguson, also stated that her mother's headaches and dizziness have improved. (R. 63.)

From all the above stated facts it certainly cannot be said that the evidence was uncontradicted that Mrs. Ferguson's disability is permanent. "The weight of expert testimony as to damages is for the trier of facts." 32 C.J.S. Sec 569(e), page 401. "If there is a conflict between opinion evidence whether expert or lay and other opinion or other evidence is for the trier of fact to decide." 32 C.J.S. Sec. 572, Page 416.

In *Bowman vs. City and County of San Francisco*, 42 Cal. App. 2d 144, 108 P. 2d 989 at 1000, one of the most quoted cases in point, the court stated as follows:

"The law does not require a doctor to state that future results are reasonably certain to occur before his testimony is admissible. The ultimate fact to be determined by the jury is whether it is reasonably certain that future evil consequences will flow from the injury. Any evidence reasonably tending in any appreciable degree to prove the fact is admissible. Its sufficiency to prove that fact is largely for the jury." Cited in: *Leenders vs. California Hawaiian Sugar Refining Corp.*, 59 Cal. App. 2d 752, 139 P. 2d 987, and *Khan vs. Southern Pacific Co.*, 132 Cal. App. 2d 410, 282 P. 2d 82.

From the foregoing it only logically follows that once such evidence is admitted, the trier of fact may determine as the ultimate fact that permanent injury will not result from the

facts presented. In other words, the facts presented may lead to the conclusion of lack of permanent injury rather than its presence.

By the statements of Appellants, page 12 of the Appellants' Brief, it appears that the Appellants have assumed that the trial court found that Mrs. Ferguson would be totally disabled for two years and then would be able at that time to return to her former employment. However, it would appear from the previously discussed testimony that a more reasonable assumption could be drawn in that the Court felt that Mrs. Ferguson could shortly return to part time work, either as a cook or at some other occupation, and that the award of \$6,000.00 would serve to compensate for her partial loss of wages if prorated over a period of years.

ARGUMENT II.

In Finding of Fact 5 (a) the Court found that Mrs. Ferguson's loss of earnings was \$3,000.00 from the time of the accident to the time of the trial.

It was set out in the Complaint that Mrs. Ferguson's salary was \$60.00 a week. (R. 48.) Mrs. Ferguson testified that she believed that she got a dollar a day for meals (R. 49) but the actual amount paid to her was \$60.00 a week. (R. 49.) She stated that she worked *about* four weeks since the accident (R. 48) but no definite dates were given as to when the employment took place. Mrs. Clara Osterman, her employer, testified that Mrs. Ferguson received \$60.00 a week with a \$6.00 food allowance. (R. 58.) However, that her actual salary was \$60.00. (R. 58.) Certainly it cannot be stated from this evidence that the court "assumed" (Appellants' Brief, page 11) that Mrs. Ferguson earned \$60.00 a week but that the court found this to be a fact after a careful evaluation of the vague evidence on the point of salary and length of employment after the accident.

ARGUMENT III.

With regard to the award of \$1,000.00 for pain and suffering, it should be noted that Mrs. Ferguson spent only six days in the hospital and that her full medical and hospital damages were only \$288.90. (R. 23.)

It would appear futile to discuss the testimony on which the Court based this finding 5(c) (R. 29) because the testimony of each witness in some measure would be considered in an award of this nature. In the case of *Coppinger vs. Broderick, et al.*, 37 Ariz. 473, 295 P. 780 at page 781, the Court stated:

"If there is submitted sufficient evidence to at all justify an instruction on pain and suffering the question on what shall be allowed in that amount is up to the jury, not on certainties but on probabilities."

CONCLUSION

The question raised on this appeal brings out no important question of law. Its issues are solely ones of fact. As stated in Federal Rules Civil Procedure Rule 52, 28 U.S.C.A.:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge credibility of the witnesses."

In *U. S. vs. Oregon Medical Society*, 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. 978, the Court quoted from *Boyd vs. Boyd*, 252 N. Y. 422, 429, 169 N.E. 632 at 634, which stated:

"Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth."

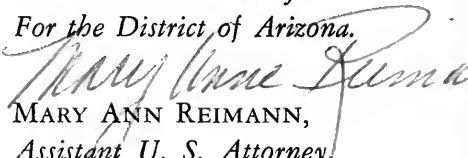
Upon consideration of the complete transcript there can certainly be no belief that the findings objected to herein are

completely erroneous nor could this Court be left with a definite and firm conviction that a mistake has been committed. *United States vs. United States Gypsum Co.*, 68 S. Ct. 525, 333 U. S. 364, 92 L. Ed. 746.

It is respectfully submitted that upon consideration of all the testimony of each witness there is an abundance of evidence upon which the trial court based each of the findings of fact objected to herein.

Respectfully submitted,

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No. 15,320

In the

United States Court of Appeals

For the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FER-
GUSON, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply Brief

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PAUL P. O'BRIEN, CL

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GUSON, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply Brief

STATEMENT OF THE CASE

The Government does not challenge the facts as set forth in Appellants' Statement of the Case. Indeed, the Statement of Facts contained in the Brief for the Appellee (hereinafter designated "B.A." for page reference), though somewhat less detailed, is almost identical.

There are, however, some inaccuracies in the Government's statement. The collision did not occur on June 26, 1955 (B.A. 2), but on June 24, 1955. (R. 3, 6, 11, 14, 36; Exhibit 2) The findings, inadvertantly, also give the date of the collision as June 26, 1955. (R. 28) Dr. Born is described in the Government's Brief (B.A. 3) and in the minutes of the District Court (R. 18) as Dr. Ernest A. Born; in the report-

er's transcript he is referred to as Dr. Dennis Born. (R. 111) Dr. Born did not examine Mrs. Ferguson on June 26, 1955 (B.A. 3), but on June 26, 1956. (R. 112)

REPLY TO GOVERNMENT'S ARGUMENT

I. The Government Has Evaded the Issue of Permanency.

The contention made by Appellants' Specification of Error No. 1, amplified in Argument I., is that Mrs. Ferguson's disability was conclusively shown by the evidence to be permanent. Appellants discuss in detail the evidence in this regard. The Government does not dispute any statement of the evidence made by Appellants on this issue. Neither does the Government cite any evidence which contradicts the fact of permanency.

Instead, the Government completely evades the question by reference to matters immaterial to this appeal.

A. DR. ARNOLD'S PRESENCE WAS NOT NECESSARY.

Reference is made to the absence of Dr. Arnold from the trial "although he was available". The Government does not say that if he were present he would have established lack of permanency. Apparently it would have this Court draw such an inference. The fact is, as shown by the evidence, Dr. Arnold saw Mrs. Ferguson only during the three months immediately following the collision. Since that time she has been under the constant care and treatment of Dr. Walter Brazie, her family physician for several years. (R. 66-70) Dr. Arnold was qualified to state only the immediate effects of the collision on Mrs. Ferguson. His observations and opinions in that regard were in evidence. (Exhibits 1 and 2; R. 42, 51) There could be no one, however, more qualified than Dr. Brazie to testify to the effects of the collision on Mrs. Ferguson either since the three month period immediately following, or in the future.

Incidentally, with Dr. Brazie in Prescott for the trial, Dr. Arnold's presence would have left the City of Kingman, some 170 miles distant, with no other doctors around. (R. 129) For this reason he was not truly available. If he had been available, and if his testimony would have been helpful to the Government, there can be no doubt it would have called him as a witness.

B. THE BASIS FOR DR. BRAZIE'S TESTIMONY WAS EMINENTLY SOUND.

The Government attacks Dr. Brazie's testimony because he did not discuss Mrs. Ferguson's case with Dr. Arnold or Dr. Eisenbeiss and did not see the hospital reports, because he did not do any "clinical" work other than blood pressure readings and urinalysis and because his testimony was based "almost entirely" on the history given him by Mrs. Ferguson. (B.A. 4, 5) The attack is unjustified. More important, it does not aid this Court in determining the issue.

At the risk of repetition, it must be emphasized that Dr. Brazie had been Mrs. Ferguson's family physician for several years prior to the collision and was very familiar with her condition of health. (R. 66-69, 78) Since the three months immediately following the collision Dr. Brazie has made clinical observations and examinations of Mrs. Ferguson every two weeks. (R. 70) By way of laboratory work Dr. Brazie has taken her blood pressure and a urinalysis. (R. 79) No other laboratory tests and consultations are shown to have been necessary or even warranted. (R. 83-84) Dr. Brazie has also observed Mrs. Ferguson's reaction, over an extended period of time, to intensive treatment. (R. 71, 73, 79, 81, 82)

Dr. Brazie's testimony was based on the above, as well as on the history given by Mrs. Ferguson. And the Government does not suggest that the history as given by Mrs. Ferguson was inaccurate.

Again it is worthy to observe that the attack on Dr. Brazie does not produce evidence to justify a finding that Mrs. Ferguson is not permanently disabled.

C. MRS. FERGUSON CONTINUES TO BE DISABLED AS A RESULT OF THE COLLISION.

The Government apparently argues that Mrs. Ferguson is no longer disabled, or if she is, her disability is due to her lack of treatment. (B.A. 5) The argument is without merit. Moreover, the trial court found to the contrary.

Dr. Brazie first discovered that Mrs. Ferguson had high blood pressure in April, 1951. (R. 85) He treated Mrs. Ferguson for her blood pressure on three occasions, after which she did not return for that purpose. (R. 82-83) The reason why she didn't return was because she was not having any trouble with this condition, and it was in no way disabling. (R. 51, 54-55, 68-69, 72-73) Furthermore, Mrs. Ferguson did consult Dr. Brazie from time to time with acute illnesses (R. 74) and he had last seen her as recently as five months before the collision. (R. 76) There was no testimony from which even the slightest inference can be drawn that Mrs. Ferguson's present condition is due to her lack of treatment. The trial court found that it was caused by the collision. (R. 29)

The Government cites, out of context, the testimony of Dr. Brazie that a blood pressure reading which he took three days before the trial was the same as a reading taken a few years before the collision, that at the time of the trial Mrs. Ferguson's condition had improved over what it was shortly after the collision, and that Mrs. Ferguson can now do light housework and possibly baby sitting. (B.A. 5) The Government would apparently have the court believe contrary to all the testimony, that Mrs. Ferguson is no longer disabled.

Dr. Brazie explained that although at times Mrs. Ferguson's blood pressure following the collision was the same as, or even lower, than it had been prior to the collision, intensive treatment has not succeeded in controlling her blood pressure at a constant level, but it is continually up and down. (R. 70-71, 73) Dr. Brazie further explained that while Mrs. Ferguson's disabling symptoms, which persisted at the time of the trial (R. 71-72, 87), had improved since shortly after the collision, they had about become stationary and would not improve sufficiently to enable Mrs. Ferguson to return to a gainful occupation. (R. 72, 80-81) She can perform light housework (R. 81), but she must perform her own and not someone else's. (R. 55-56) Dr. Brazie said she could do baby sitting, "up to a point, depending a great deal on the baby and her reaction to the children". (R. 81) Mrs. Ferguson cannot even enjoy the normal activities of her own grandchildren. (R. 45-46, 62-63)

The trial court awarded Mrs. Ferguson a sum for her loss of earnings not only to the time of trial, but in the future as well. (R. 29) The trial court therefore found that Mrs. Ferguson continued to be disabled at the time of trial.

Even out of context, the testimony of Dr. Brazie referred to by the Government fails to prove that Mrs. Ferguson has no permanent disability. When considered together with all of Dr. Brazie's testimony, there is no room for any inference other than that Mrs. Ferguson's disability is permanent.

D. POSSIBILITIES ARE TOO CONJECTURAL TO SUPPORT A FINDING.

Both Dr. Westfall and Dr. Born testified that there are many instances where persons with hypertension can and have returned to full activity. Dr. Born went further and said that most cases of high blood pressure are controllable. It must be conceded that if ever Mrs. Ferguson's symptoms are cured, she can then return to her former occupation.

The Government relies heavily on these statements. But they are generalities, at best, and do not answer the essential question of whether or not Mrs. Ferguson's symptoms can or will be cured. Dr. Brazie and Dr. Westfall are emphatic that they can not and will not. On the other hand, Dr. Born, undoubtedly realizing his lack of familiarity with Mrs. Ferguson's condition, was most reluctant to, and did not, express any opinion in this regard.

The Government counters with the argument that from the generalities it may be inferred that there is a possibility Mrs. Ferguson will be cured, and the law permits doctors to state possibilities.

Appellants do not agree that in Arizona testimony as to the future consequences of an injury may be stated merely in terms of the possible. In the case of *Southwestern Freight Lines v. Floyd*, 58 Ariz. 249, 119 P.2d 120, the statement that testimony by an *attending* physician regarding possible future consequences is admissible was dicta, for the court also observed (119 P.2d 127):

“* * * After her injury it is shown she lost her memory to the extent that she could not remember anything of the accident and that she had a change of personality and for a short time headaches—the things the doctor stated might occur and in fact did occur. * * * In this case the answer of the doctor shows he was not speculating or conjecturing, for what he said was possible actually happened. * * *”

Regardless, however, of whether such testimony is admissible, in this case Doctor Born did not state the possibility but left it to be drawn by inference. What value is the inference? The courts have held that it is of no value.

In *Hartford Acc. & Indem. Co. v. Industrial Commission*, 38 Ariz. 307, 299 Pac. 1026, the Arizona Supreme Court, speaking through the same Judge who wrote the opinion in

the *Floyd* case, *supra*, held that testimony as to the possible effects of an injury is not sufficient to support a finding that those effects exist.

The Government says (B.A. 7) that *Bowman v. City and County of San Francisco*, 42 Cal. App. 2d 144, 108 P.2d 989, is one of the most quoted cases in point. Appellants, with regret, point out that the case is misquoted in the Government's brief. In the *Bowman* case the question arose as to whether or not plaintiff would later develop epileptic seizures. Plaintiff's doctor testified that he would not say plaintiff was reasonably certain to develop seizures; he would say that they might occur and that he would not be surprised if they did, but he would not say it was reasonably certain. Reading the Government's quotation from this case gives the impression that everything between the quotation marks is as it appears in the opinion. In truth, three sentences are omitted. One of those sentences, skillfully omitted, is a complete answer to the Government's argument. It reads as follows (108 P.2d 1000):

“* * * The testimony referred to above would not, standing alone, support an award for future consequences. * * *”

E. THE PERMANENCY OF MRS. FERGUSON'S DISABILITY WAS A MATTER ONLY FOR THE EXPERTS.

In certain cases the Arizona Supreme Court has been liberal in upholding a jury award for permanent injuries though there is no corroborating medical testimony, or even medical testimony to the contrary. *City of Phoenix v. Mullen*, 65 Ariz. 83, 174 P.2d 422; *Hirsh v. Manley*, 81 Ariz. 94, 300 P.2d 588. In those cases, however, the court's opinions disclose that there was sufficient evidence, albeit non-expert, to warrant an inference that the injuries were in fact permanent.

If there were sufficient evidence, expert or non-expert, in this case to justify an inference that Mrs. Ferguson's disability is not permanent, we would agree that a finding to this effect would be justified. But that is not the situation. In this case there is direct evidence by two qualified experts that Mrs. Ferguson's disability is permanent, in contradiction of which is, at most, evidence from which it may be inferred that there is a possibility Mrs. Ferguson might recover.

The etiology and pathology of hypertensive heart disease was discussed by the doctors. The treatment was explained and the prognosis given. The complicated workings of the heart and nervous system cannot be within the common knowledge of non-expert laymen. Often even the experts have to rely on an autopsy for proof of their diagnosis. (R. 84)

It therefore follows that the future consequences of Mrs. Ferguson's aggravated hypertension depend essentially on the knowledge, skill and experience of medical experts. This is no subject for which a layman is permitted to substitute his own opinions.

F. THE TRIAL COURT FOUND TOTAL DISABILITY.

The trial court found that the collision and resulting injuries to Mrs. Ferguson caused her "temporary total disability" and awarded her \$6,000 for loss of future earnings. (R. 29) The Government says that from these findings it may reasonably be assumed that the trial court felt that Mrs. Ferguson could shortly return to part time work and awarded her \$6,000 as compensation for partial loss of wages over a period of years. The Government thereby demonstrates the reason for this appeal and the necessity of a reversal.

There was no evidence that Mrs. Ferguson is only partially disabled. Thus, the trial court found that her disability was "total". Likewise, there was no evidence as to how long, if not permanently, her disability would continue. Yet the trial court found that Mrs. Ferguson's disability was "temporary" and awarded her the equivalent of a little less than two years' earnings.

We respectfully submit that upon reviewing the evidence and the findings, the conclusion is inescapable that the trial court indulged in unwarranted conjecture and speculation.

G. THE GOVERNMENT CONCEDES THE ISSUE OF PERMANENCY.

In its brief the Government argues that the finding of temporary total disability was justified. Instead of demonstrating that there was evidence to support the finding, it evades the issue or refers to evidence on issues resolved, without attack, by the trial court. Appellants suggest that the Government has tacitly conceded that the finding was truly unwarranted.

II. The Evidence Concerning Mrs. Ferguson's Earnings Was Clear and Conclusive.

The evidence established beyond doubt that at the time of the collision Mrs. Ferguson was earning \$66.00 per week. (R. 40, 49, 58) The fact that \$6.00 a week was given in board instead of cash is immaterial.

Both Mrs. Ferguson and Mrs. Osterman, her employer, testified that Mrs. Ferguson worked only four weeks after the collision. (R. 48, 53, 59)

The testimony in both respects was clear and uncontradicted. The award by the trial court of \$3,000 for loss of earnings to the time of trial was arbitrary.

III. Mrs. Ferguson's Pain and Suffering Is Not Denied.

In their Opening Brief, Appellants review in detail the uncontradicted evidence of the many months Mrs. Ferguson has suffered from disturbed memory, weakness, dizziness and extreme nervousness. She cannot work or perform her normal household duties or fully enjoy the company of her grandchildren. The scar above her right eye is permanent.

None of this is denied. The Government merely says that Mrs. Ferguson was only in the hospital six days and that her full medical and hospital damages were only \$288.90. Again the Government evades the issue and does not answer it.

Appellants recognize that the trial court must be allowed latitude in assessing damages for pain and suffering. When the latitude is abused it is time for this Court to step in. The award of \$1,000 under the circumstances disclosed by this case was grossly inadequate.

IV. Conclusion.

The findings made by the trial court are not sanctified. When the record discloses that a mistake was committed it may reverse erroneous findings by a trial court, even though it would not do so if the findings were made by a jury or administrative agency. *United States v. United States Gypsum Co.*, 68 S. Ct. 525, 541, 333 U.S. 364, 394-395, 92 L.Ed. 746, 765-766.

Due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses. In this case not one witness was impeached. Nor even was there an attempt to impeach any witness. Credibility was not involved.

What was involved in the trial court, and what is involved here, is an interpretation of the meaning and effect of the testimony. The testimony is just as much before this Court

as it was before the trial court, and this Court has the same opportunity to appraise it.

Appellants urge that the errors committed by the trial court should be corrected so that Appellants will not be made to suffer the results of a mistake.

Respectfully submitted,

MOORE & ROMLEY

By JARRIL F. KAPLAN

No. 15321

United States
Court of Appeals
for the Ninth Circuit

JOHN COSTELLO, as Trustee of the Estate of
William Jason Evans, Bankrupt,
Appellant,
vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California.
Southern Division.

FILED

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No. 15321

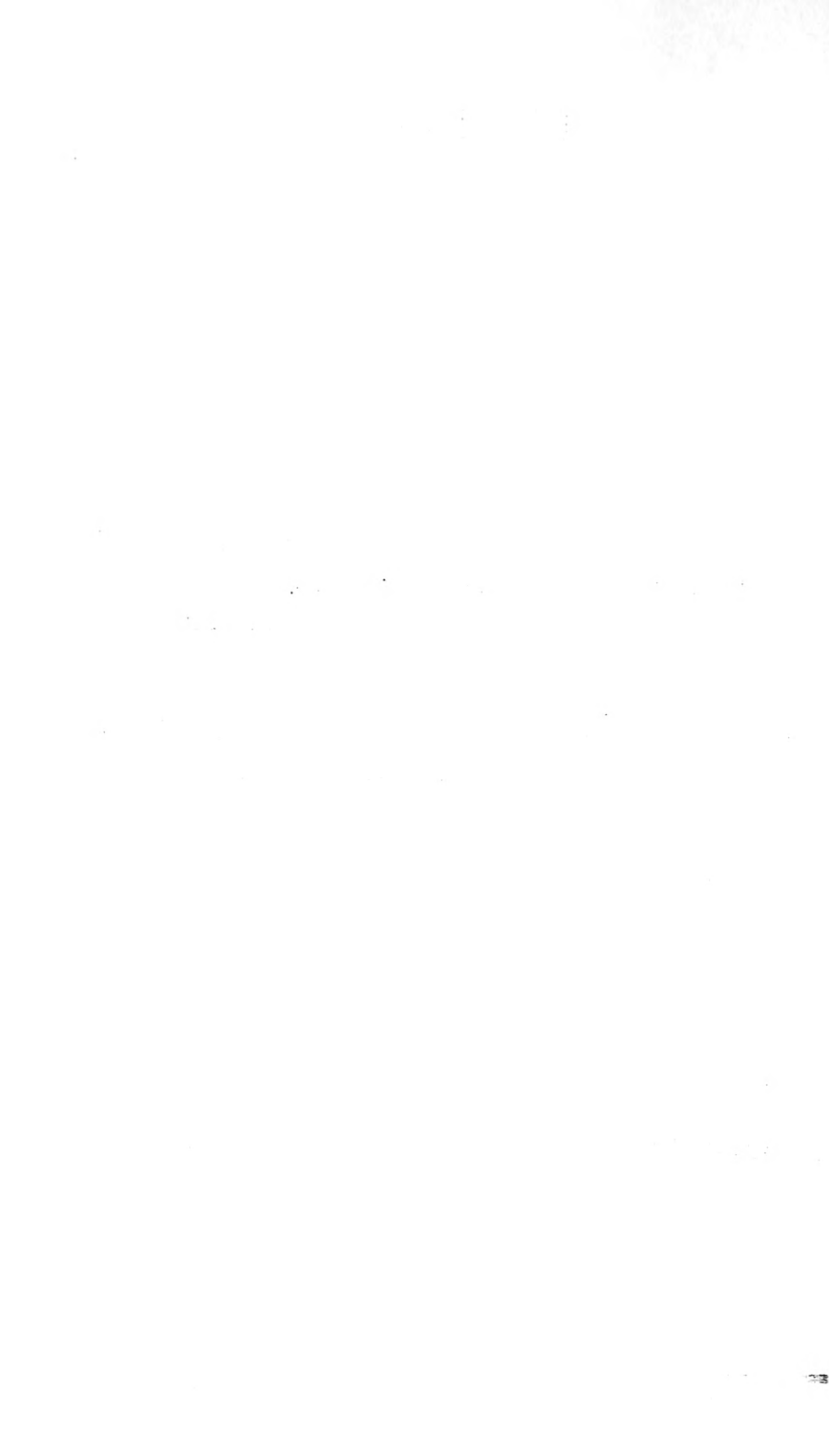
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Court of Appeals
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In the Southern Division of the United States
District Court for the Northern District of
California

No. 31390

JOHN COSTELLO, as Trustee of the Estate of
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SAVINGS ASSOCIATION, a National Bank-
ing Association,
Defendant.

COMPLAINT TO SET ASIDE TRANSFER
OF ACCOUNTS RECEIVABLE

Plaintiff complains of defendant, and, for cause of
action, alleges:

I.

That the jurisdiction of the above-entitled Court
is based on the provisions of Section 70(e) of the
Bankruptcy Act [11 USC, Sec. 110 (e)].

II.

That William Jason Evans, hereinafter referred
to as the Bankrupt, filed a voluntary petition in
bankruptcy with the Clerk of the above-entitled
Court on the 27th day of February, 1950, and was
in said petition duly adjudged bankrupt.

III.

That thereafter, at a first meeting of creditors
duly and regularly called and held in said bank-

ruptcy proceedings, plaintiff was appointed Trustee of the estate of said bankrupt, and thereafter qualified as such Trustee by filing his bond in the penal sum set by the Court, and ever since then has been and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt.

IV.

That during all of the times herein mentioned, defendant was and now is a national banking association organized and existing under and by virtue of the laws of the United States of America.

V.

That heretofore and prior to the 15th day of September, 1948, the Bankrupt, doing business under the fictitious name of Evans Construction Co., entered into a contract with the State of California to perform work and services, and to supply goods in the construction of a public work known as the Chamberlain Creek Job; that said contract was a contract which, in the regular course, would result in an open-book account.

VI.

That on or about the 15th day of September, 1948, said Bankrupt assigned to defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the State of California under and pursuant to the contract referred to in Paragraph V hereof.

VII.

That no notice of intention to assign and/or no

notice of assignment has ever been filed with the County Recorder of the County of Alameda in which County said Bankrupt maintained his principal place of business, and there are creditors of said Bankrupt who had no actual notice of said assignment.

VIII.

That the funds in the possession of plaintiff as such Trustee in bankruptcy are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said Bankrupt at the time of the said assignment, and who became creditors of said Bankrupt subsequent to the assignment, but without notice thereof.

IX.

That subsequent to the execution of said assignment, and pursuant thereto, the State of California paid to defendant the sum of Twenty-One Thousand Three Hundred Forty-Six Dollars and Five Cents (\$21,346.05), which said sum plaintiff demanded of defendant on the 31st day of December, 1951, but defendant has failed, refused and neglected to pay same to plaintiff.

As and for a Separate, Second and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff incorporates and adopts herein by reference all of the allegations contained in paragraphs I, II, III and IV of his first cause of action.

II.

That heretofore and prior to the 15th day of November, 1948, the Bankrupt, doing business under the fictitious name of Evans Construction Co., entered into a contract with the County of Shasta, State of California, to perform work and services, and to supply goods in the construction of a bridge over the Pitt River in said County; that said contract was a contract which, in the regular course, would result in an open-book account.

III.

That on or about the 15th day of November, 1948, said Bankrupt assigned to defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the County of Shasta, State of California, under and pursuant to the contract referred to in Paragraph II hereof.

IV.

That no notice of intention to assign and/or no notice of assignment has ever been filed with the County Recorder of the County of Alameda in which County said Bankrupt maintained his principal place of business, and there are creditors of said Bankrupt who had no actual notice of said assignment.

V.

That the funds in the possession of plaintiff as such Trustee in bankruptcy are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said

Bankrupt at the time of the said assignment, and who became creditors of said Bankrupt subsequent to the assignment, but without notice thereof.

VI.

That subsequent to the execution of said assignment, and pursuant thereto, the County of Shasta, State of California, paid to defendant the sum of Fifty-Three Thousand Eight Hundred Forty-Three Dollars and Six Cents (\$53,843.06), which said sum plaintiff demanded of defendant on the 31st day of December, 1951, but defendant has failed, refused and neglected to pay same to plaintiff.

Wherefore, plaintiff, as Trustee in bankruptcy, prays judgment against defendant for the sum of Twenty-One Thousand Three Hundred Forty-Five Dollars and Five Cents (\$21,345.05) by reason of plaintiff's first cause of action, and for the sum of Fifty-Three Thousand Eight Hundred Forty-Three Dollars and Six Cents (\$53,843.06) by reason of plaintiff's second cause of action, or a total of Seventy-Five Thousand One Hundred Eighty-Eight Dollars and Eleven Cents (\$75,188.11), together with interest thereon at the rate of Seven Per Cent (7%) per annum from the 31st day of December, 1951, together with plaintiff's costs incurred herein.

SHAPRO & ROTHSCCHILD,

By /s/ AUGUST B. ROTHSCCHILD,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed March 31, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT TO SET ASIDE
TRANSFER OF ACCOUNTS RECEIVABLE

Plaintiff complains of Defendant, and, for cause of action, alleges:

I.

That the jurisdiction of the above-entitled court is based on the provisions of Section 70(e) of the Bankruptcy Act [11 USC, Sec. 110(e)].

II.

That William Jason Evans, hereinafter referred to as the Bankrupt, filed a voluntary petition in bankruptcy with the Clerk of the above-entitled Court on the 27th day of February, 1950, and was on said petition duly adjudged bankrupt.

III.

That thereafter, at a first meeting of creditors duly and regularly called and held in said bankruptcy proceedings, Plaintiff was appointed Trustee of the estate of said Bankrupt, and thereafter qualified as such Trustee by filing his bond in the penal sum set by the Court, and ever since then has been and now is the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

IV.

That during all of the times herein mentioned, Defendant was and now is a national banking association organized and existing under and by virtue of the laws of the United States of America.

V.

That heretofore and prior to the 15th day of September, 1948, the Bankrupt, doing business under the fictitious name of Evans Construction Co., entered into a contract with the State of California to perform work and services, and to supply goods in the construction of a public work known as Chamberlain Creek Job; that said contract was a contract which, in the regular course, would result in an open-book account.

VI.

That prior to the 15th day of September, 1948, Defendant loaned to the Bankrupt for use in performance of the above-mentioned contract the sum of \$20,000.00.

VII.

That on or about the 15th day of September, 1948, said Bankrupt assigned to Defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the State of California under and pursuant to the contract referred to in Paragraph V hereof.

VIII.

That no notice of intention to assign and/or no notice of assignment has ever been filed with the County Recorder of the County of Alameda, in which county said Bankrupt maintained his principal place of business.

IX.

That the funds in the possession of Plaintiff, as such Trustee in Bankruptcy, are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said Bankrupt at the time of said assignment and who had no actual notice thereof; that there are creditors of said Bankrupt who became creditors of said Bankrupt after said assignment but before collection of said accounts by Defendant without actual notice of said assignment.

X.

That subsequent to the execution of said assignment, and pursuant thereto, the State of California paid to Defendant the sum of Twenty-One Thousand Three Hundred Forty-Six Dollars and Five Cents (\$21,346.05), which said sum Plaintiff demanded of Defendant on the 31st day of December, 1951, but Defendant has failed, refused and neglected to pay same to Plaintiff.

As and for a Separate, Second and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff incorporates and adopts herein by reference all of the allegations contained in Paragraphs I, II, III and IV of his first cause of action.

II.

That heretofore and prior to the 15th day of November, 1948, the Bankrupt, doing business under

the fictitious name of Evans Construction Co., entered into a contract with the County of Shasta, State of California, to perform work and services, and to supply goods in the construction of a bridge over the Pitt River in said County; that said contract was a contract which, in the regular course, would result in an open-book account.

III.

That prior to the 15th day of November, 1948, Defendant loaned to the Bankrupt for use in performance of said contract the sum of \$3,300.00.

IV.

That on or about the 15th day of November, 1948, said Bankrupt assigned to Defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the County of Shasta, State of California, under and pursuant to the contract referred to in Paragraph II hereof.

V.

That no notice of intention to assign and/or no notice of assignment has ever been filed with the County Recorder of the County of Alameda, in which county said Bankrupt maintained his principal place of business.

VI.

That the funds in the possession of Plaintiff, as such Trustee in Bankruptcy, are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said

Bankrupt at the time of said assignment and who had no actual notice thereof; that there are creditors of said Bankrupt who became creditors of said Bankrupt after said assignment but before collection of said accounts by Defendant without actual notice of said assignment.

VII.

That subsequent to the execution of said assignment, and pursuant thereto, the County of Shasta, State of California, paid to Defendant the sum of Fifty-Three Thousand Eight Hundred Forty-Three Dollars and Six Cents (\$53,843.06), which said sum Plaintiff demanded of Defendant on the 31st day of December, 1951, but Defendant has failed, refused and neglected to pay same to Plaintiff.

Wherefore, Plaintiff, as Trustee in Bankruptcy, prays judgment against Defendant for the sum of \$20,000.00 by reason of Plaintiff's first cause of action and for the sum of \$13,300.00 by reason of Plaintiff's second cause of action, or a total of \$33,300.00, together with interest thereon at the rate of seven per cent (7%) per annum from the 31st day of December, 1951, together with Plaintiff's costs incurred herein.

SHAPRO & ROTHCHILD,

By /s/ DANIEL R. COWANS,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 19, 1953.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

The defendant in answer to the amended complaint and to the first cause of action set forth therein admits, denies and alleges:

I.

Admits the allegations set forth in paragraphs I, II, III and IV.

II.

Admits that prior to the 15th day of September, 1948, the bankrupt entered into a written contract with the State of California to construct a public work known as the Chamberlain Creek Job, but denies that the bankrupt otherwise agreed to perform work or services for or to supply goods to the State of California, and denies that said contract was a contract which in the regular course, or at all, would result in an open, or any, book account.

III.

Denies that prior to the 15th day of September, 1948, the defendant loaned to the bankrupt for use in performance of the above-mentioned contract, or at all, the sum of \$20,000 or any sum in connection with the Chamberlain Creek Job and, in this connection, alleges that on or about the 15th day of September, 1948, the defendant agreed to finance the bankrupt in connection with said Chamberlain Creek Job. Thereafter, defendant made the follow-

ing loans and received the following payments in connection with said job:

Chamberlain Creek Job Loans

1—September 16, 1948.....	No. 5916	\$ 3,000.00
2—September 21, 1948.....	No. 5959	2,000.00
3—October 2, 1948.....	No. 6075	1,000.00
4—October 11, 1948.....	No. 6118	3,000.00
5—October 23, 1948.....	No. 6141	2,000.00
6—October 30, 1948.....	No. 6296	1,500.00
7—November 8, 1948.....	No. 6344	1,500.00
8—November 15, 1948.....	No. 6400	2,000.00
9—November 22, 1948.....	No. 6460	700.00
10—November 29, 1948.....	No. 6526	500.00
11—December 4, 1948.....	No. 6594	400.00
12—December 13, 1948.....	No. 6679	1,200.00
13—December 20, 1948.....	No. 6794	1,500.00
Total		<hr/> \$20,300.00

Payments

1—October 11, 1948.....	\$ 5,445.00
(Notes 1 & 2 & \$445 on account, note 3 with \$18.33 interest.)	
2—November 16, 1948.....	\$ 888.10
(On account note 7.)	
3—December 13, 1948.....	\$ 6,666.90
(Notes 4, 5, 10 and balance notes 3 & 7 with \$30.83 interest.)	
4—December 20, 1948.....	
(Balance due renewed by note No. 6747—\$7,300.00 and \$29.56 interest paid.)	
5—January 6, 1949.....	\$ 3,785.76
(On account note No. 6747.)	
6—March 22, 1949.....	\$ 1,834.51
(On account note No. 6747.)	
7—April 7, 1949.....	\$ 1,679.73
(Balance with \$69.09 interest.)	
Total	<hr/> \$20,300.00

IV.

Admits that on or about the 15th day of September, 1948, bankrupt assigned to defendant all monies then due, or thereafter to become due, from the State of California in connection with the Chamberlain Creek Job and in this connection alleges that the bankrupt had prior thereto assigned all of said monies to the Glens Falls Indemnity Company which on or about September 15, 1948, consented to the assignment to defendant in consideration of the deposit of all monies received under such assignment in a joint-control account to be withdrawn only upon an authorized signature of the bankrupt countersigned by a designated officer or agent of Glens Falls Indemnity Company and the monies thereafter received from the State of California with the exception of a payment on January 6, 1949, in the amount of \$3,785.76, were deposited in said joint-control account and said payment of January 6, 1949, was applied on account of note No. 6747 listed above.

V.

Admits that no notice of intention to assign or notice of assignment was filed with the county recorder of the County of Alameda in connection with the assignment to the defendant of monies due or to become due on the Chamberlain Creek Job, but denies that any such notice of intention to assign or notice of assignment was at any time herein mentioned required by any law of the United States or of the State of California.

VI.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of any averment set forth in paragraph IX and basing its denial on that ground denies each of said averments generally and specifically; and further denies that there are any creditors of the bankrupt who now are or at any time have been in a position to question the validity of the aforesaid assignment or of any payments received by defendant thereunder.

VII.

Admits that the State of California paid to defendant the sum of \$21,346.05 in connection with said Chamberlain Creek Job and that plaintiff demanded said sum from defendant on or about the 31st day of December, 1951; and admits that the defendant has failed and refused to pay said sum to plaintiff, but denies that defendant neglected to pay said sum to plaintiff or that said sum or any part thereof is due or owing from the defendant to plaintiff or to any creditor of the bankrupt.

As a further and separate defense to the first cause of action, the defendant alleges that the assignment of the monies due or to become due to the bankrupt under the contract for the Chamberlain Creek Job and the payment of monies thereunder to the defendant were at the most only preferential, and the first cause of action is barred by Section 60 (a) of the Bankruptcy Act.

The Defendant in Answer to the Second Cause of Action Admits, Denies and Alleges:

I.

Admits the allegations of paragraphs I, II, III and IV of the first cause of action which are incorporated and adopted by reference as paragraph I of the second cause of action.

II.

Admits that prior to the 15th day of November, 1948, the bankrupt entered into a contract with the County of Shasta, State of California, to construct a bridge over the Pitt River, which contract is sometimes referred to as the Pittville Job; but denies that the bankrupt otherwise agreed to perform work or services for or supply goods to the County of Shasta and denies that said contract was a contract which in the regular course of business, or at all, would result in an open, or any book account.

III.

Admits that prior to the 15th day of November, 1948, the defendant loaned to the bankrupt for use in the performance of said contract the sum of \$3,500 and alleges that said sum was repaid by the bankrupt on November 8, 1948, and prior to the assignment hereinafter mentioned.

IV.

Admits that on or about the 15th day of November, 1948, the bankrupt assigned to the defendant all monies due or to become due to the bankrupt

from the County of Shasta under and pursuant to the contract heretofore mentioned and, in this connection, the defendant alleges that from and after the 15th day of November, 1948, the defendant made the following loans to and received the following payments from the bankrupt in connection with the Pittville Job:

Pittville Job

Loans

1—October 23, 1948.....	No. 6140	\$ 2,000.00
2—October 30, 1948.....	No. 6297	1,500.00
3—November 8, 1948.....	No. 6345	1,000.00
4—November 15, 1948.....	No. 6402	3,000.00
5—November 22, 1948.....	No. 6462	1,000.00
6—November 29, 1948.....	No. 6527	1,000.00
7—December 4, 1948.....	No. 6595	1,000.00
8—December 20, 1948.....	No. 6748	2,500.00

Total	\$13,000.00
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Payments

November 8, 1948.....	\$3,500.00
(Notes 1 & 2 and interest of \$6.92.)	
December 13, 1948.....	\$7,000.00
(Notes 3, 4, 5, 6 & 7 and interest of \$26.50.)	
January 8, 1949.....	\$2,500.00
(Note 8 and \$7.92 interest.)	

V.

Admits that no notice of intention to assign or notice of assignment was filed with the county recorder of the County of Shasta in connection with the assignment to the defendant of monies due or to become due on the Pittville Job, but denies that any such notice of intention to assign or notice of

assignment was at any time herein mentioned required by any law of the United States or of the State of California.

VI.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of any averment set forth in paragraph VI and basing its denial on that ground denies each of said averments generally and specifically; and further denies that there are any creditors of the bankrupt who now are or at any time have been in a position to question the validity of the aforesaid assignment or of any payments received by defendant thereunder.

VII.

Denies that subsequent to the execution of the assignment mentioned herein and pursuant thereto the County of Shasta paid to the defendant the sum of \$53,843.06 or any sum in excess of \$53,428.68, but admits that on or about the 31st day of December, 1951, the plaintiff demanded said sum of \$53,843.06 from the defendant, which defendant has failed and refused to pay to plaintiff; but denies that defendant neglected to pay sum to plaintiff or that said sum or any part thereof is now due or owing from defendant to plaintiff or to any creditor of the bankrupt.

As a further and separate defense to the second cause of action the defendant alleges that the assignment of the monies due, or to become due, to the bankrupt under the contract for the Pittville Job

and the payment of monies thereunder to the defendant were at the most only preferential, and the second cause of action is barred by section 60 (a) of the Bankruptcy Act.

Wherefore, defendant prays that plaintiff take nothing by reason of the amended complaint or either cause of action set forth therein and that the defendant have judgment for costs of suit herein and such other and further relief that may be proper in the premises.

SAMUEL B. STEWART, JR.,
CHRISTOPHER M. JENKS,
H. H. BECHTEL,

By /s/ CHRISTOPHER M. JENKS,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 1, 1953.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled matter having regularly come on for pretrial conference before the above-entitled Court on the 14th day of October, 1954, the above-named plaintiff being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), his attorneys, and the defendant being represented by Christopher M. Jenks, Esq., one of its attorneys,

and after proceedings had and with the consent of counsel for the respective parties, it was stipulated that the Court might make and enter herein the following Order after said pretrial of the above-entitled action; and good cause appearing therefor,

It Is Hereby Ordered as follows:

1. That the figure \$3,300.00 appearing on line 4, page 4 of plaintiff's Amended Complaint to Set Aside Transfer of Accounts Receivable may be deemed amended by inserting in lieu thereof the figure \$13,000.00.

2. That the figure \$20,000.00 appearing on line 1, page 5 of plaintiff's Amended Complaint to Set Aside Transfer of Accounts Receivable may be deemed amended by inserting in lieu thereof the figure \$20,300.00

3. That the figure \$13,300.00 appearing on line 2, page 5 of plaintiff's Amended Complaint to Set Aside Transfer of Accounts Receivable may be deemed amended by inserting in lieu thereof the figure \$13,000.00.

4. That the contract referred to in paragraph V of the First Count of Plaintiff's said Amended Complaint between Evans Construction Co. and the State of California shall be supplied to the Court upon the trial of this cause in form acceptable to counsel for the respective parties.

5. That a photostatic copy of the assignment referred to in paragraph VII of plaintiff's said

Amended Complaint be furnished to plaintiff's counsel by defendant and that same may be admitted in evidence upon the trial of this cause subject to objections thereto only as to the competency, relevancy and/or materiality of said document.

6. That photostatic copies of six State warrants which constituted the payments, referred to in paragraph VII, page 4 of defendant's Answer to Amended Complaint as Amended, may be admitted in evidence at the trial of this cause on behalf of defendant. Said warrants are described as follows:

Date	Number	Amount
Oct. 4, 1948.....	B 26931	\$5,445.00
Nov. 8, 1948.....	H-41773	839.25
Dec. 9, 1948.....	R 1539	6,720.00
Dec. 31, 1948.....	R 7025	3,785.76
Feb. 25, 1949.....	R 21555	2,834.51
Apr. 1, 1949.....	776	1,721.53

7. That photostatic copies of nine Shasta County warrants which constituted the payment referred to in paragraph VII, page 7 of defendant's Answer to Amended Complaint as Amended, may be admitted in evidence at the trial of this cause on behalf of defendant. Said warrants are described as follows:

Date	Number	Amount
Nov. 4, 1948.....	2035	\$ 3,747.64
Dec. 9, 1948.....	2494	8,380.50
Jan. 6, 1949.....	3127	7,096.03
May 5, 1949.....	5420	18,745.31
June 9, 1949.....	5932	12,073.16
July 8, 1949.....	88	1,788.99
July 29, 1949.....	12164	4,994.69
Sept. 10, 1949.....	530	350.00
November 23, 1949.....	621	414.38

8. Manual copies of the defendant's ledger sheets for the account entitled "Evans Construction Co., Special Account, Countersignature Required, 2035 Ashby Ave., Berkeley 3, Calif." covering the period from September 16, 1948, to April 11, 1949, may be admitted in evidence at the trial of this cause on behalf of defendant.

9. Manual copies of the defendant's ledger sheets for the account entitled "Evans Construction Co., 2035 Ashby Ave., Berkeley, Calif." covering the period from October 11, 1948, to July 18, 1949, may be admitted in evidence at the trial of this cause on behalf of defendant.

10. That the prior assignment to Glens Falls Indemnity Company referred to in paragraph IV on page 3 of defendant's Answer to Amended Complaint may be received in evidence on behalf of the defendant in the regular blank form thereof supplied and used by said Glens Falls Indemnity Company, unless at the time of the trial of this cause, the actual original of said Assignment from the Bankrupt to said Glens Falls Indemnity Company dated September 15, 1948, shall be available.

11. That within ten (10) days from and after the date hereof defendant may file herein an amendment to the paragraph numbered VII of both counts of its Answer herein.

Dated at San Francisco in said District this 8th day of August, 1955.

/s/ OLIVER J. CARTER,

District Judge.

Approved:

SAMUEL B. STEWART,
GEORGE CHADWICK, JR., and
H. H. BECHTEL,

By /s/ GEORGE CHADWICK, JR.,
Attorneys for Defendant.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEY

The defendant, Bank of America National Trust and Savings Association, a national banking association, hereby substitutes George Chadwick, Jr., 300 Montgomery Street, San Francisco 4, California, as one of its attorneys in the above-entitled action in the place and stead of Christopher M. Jenks.

Dated: August 3, 1955.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION,

By /s/ E. A. IVERSEN,
Assistant Vice President.

I hereby consent to the substitution of George Chadwick, Jr., as an attorney for the defendant, Bank of America National Trust and Savings Association, a national banking association, in the above-entitled action in my place and stead.

Dated: August 3, 1955.

/s/ CHRISTOPHER M. JENKS.

I hereby agree to be substituted in the place of Christopher M. Jenks in the above-entitled action as an attorney for the defendant, Bank of America National Trust and Savings Association.

Dated: August 3, 1955.

/s/ GEORGE CHADWICK, JR.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO AMENDED
COMPLAINT

The defendant above named, after leave of the court first had and obtained, amends its Answer to Amended Complaint on file herein in the following particulars:

I.

Paragraph VII of defendant's answer to plaintiff's first cause of action, consisting of lines 14 through 30 on page 4 of the Answer to Amended Complaint, is amended to read as follows:

"Admits that the State of California paid the sum of \$21,346.05 in connection with said Chamberlain Creek Job and alleges that all of said sum was deposited in the joint-control account described in

Paragraph IV above, except for the sum of \$3,785.76 which was applied on account of note No. 6747; admits that plaintiff demanded the sum of \$21,346.05 from defendant on or about the 31st day of December, 1951, and that defendant has failed and refused to pay said sum to plaintiff, but denies that defendant neglected to pay said sum to plaintiff or that said sum or any part thereof is due or owing from the defendant to the plaintiff or to any creditor of the bankrupt.

“As a further and separate defense to the first cause of action, the defendant alleges that the assignment of money due or to become due the bankrupt under the contract for the Chamberlain Creek Job and the payment of monies thereunder as above alleged were at most only preferential and the first cause of action is barred by § 60(a) of the Bankruptcy Act.”

II.

Paragraph VII of defendant's answer to plaintiff's second cause of action, consisting of lines 7 through 25 on page 7 of the Answer to Amended Complaint, is amended to read as follows:

“Denies that subsequent to the execution of the assignment mentioned herein or pursuant thereto, the County of Shasta paid to the defendant the sum of \$53,843.06, or any sum in excess of \$51,831.63, and in this connection alleges that all of said payments were deposited in the account of Evans Construction Co.; admits that on or about the 31st day of December, 1951, the plaintiff demanded said sum

of \$53,843.06 from the defendant, which defendant has failed and refused to pay to plaintiff; but denies that defendant neglected to pay said sum to plaintiff, or that said sum or any part thereof is now due or owing from the defendant to plaintiff or to any creditor of the bankrupt.

“As a further and separate defense to the second cause of action, the defendant alleges that the assignment of monies due, or to become due, to the bankrupt under the contract for the Pittville Job and the payment of monies thereunder as above alleged were at most only preferential and the second cause of action is barred by § 60(a) of the Bankruptcy Act.”

Dated: August 3, 1955.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
H. H. BECHTEL,

By /s/ GEORGE CHADWICK, JR.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

OPINION AND ORDER FOR JUDGMENT

Goodman, District Judge.

This is an action pursuant to Section 70(e) of the Bankruptcy Act [11 USC § 110(e)], by the Trustee of the estate of a bankrupt, William Jason

Evans, doing business as Evans Construction Company. The Trustee seeks to recover from the defendant, Bank of America, \$20,300.00 collected by the Bank as assignee of the payments to become due the Evans Construction Company under a contract with the State of California for the construction of a bridge. The assignment to the Bank was made on September 15, 1948, to secure loans to be made by the Bank to Evans Construction Company to enable it to complete the bridge. As payments were received by the Bank pursuant to the assignment, it applied them to the loans made to the Construction Company until all of the loans were repaid on April 7, 1949. Nearly a year later, on February 27, 1950, Evans filed the voluntary petition on which he was adjudged a bankrupt.

Section 70(e) of the Bankruptcy Act provides in part that "A transfer made * * * by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor." The Trustee contends that the assignment made by the bankrupt to the Bank of America is voidable under Section 3019 of the California Civil Code by creditors having provable claims in the bankruptcy proceedings. Section 3019, as it read at the time of the assignment in 1948, provided that unless recorded in the manner specified therein, "no assignment of an account shall be

valid as against present or future creditors of the assignor without notice of such assignment or as against a subsequent purchaser or assignee of such account without notice of such assignment." It is conceded that the assignment here was never recorded.

Since all of the issues tendered by this cause turn upon the interpretation of California Civil Code 3019, as it read in 1948, in conjunction with related Code Sections 3017, 3018 and 3020-29, a preliminary consideration of the history and purpose of these statutory provisions is appropriate. All of these Code Sections were enacted in 1943 to aid the flourishing business of non-notification financing of accounts receivable. When accounts receivable are financed on a non-notification basis, the accounts are assigned as collateral for a loan upon the mutual understanding between the assignor and the assignee that the account debtor will not be notified of the assignment. Generally, the assignor, himself, is entrusted with the collection of the account on behalf of the assignee.

Prior to 1943, lending agencies financing receivables on a non-notification basis in California had to rely on the integrity of the assignor, since California was one of the minority of jurisdictions following the rule of *Dearle vs. Hall*¹ that notification to the account-debtor is necessary to perfect an assignment against a subsequent assignee for value

¹3 Russ. 1, 48, 38 Eng. Rep. 475 (1828).

without notice.² But, these lenders did not have to rely on the continued solvency of the assignor since notification of the account debtor was not necessary to perfect the assignment against the assignor's creditors.³

But, in 1943, the United States Supreme Court in *Corn Exchange National Bank vs. Klauder*, 318 U.S. 434, interpreted Section 60(a) of the Bankruptcy Act in a manner which made the security value of an account assigned on a non-notification basis dependent upon the continued solvency of the assignor. The effect of the Supreme Court's decision was that any assignment was voidable as a preferential transfer in the event of the assignor's subsequent bankruptcy unless it had been perfected both against his creditors and against subsequent assignees more than four months prior to bankruptcy or unless it had been perfected against both his creditors and subsequent assignees at the time it was made and was made for a contemporaneous consideration. Since assignments could never be perfected against subsequent assignees in California without notifying the account debtor, this decision made accounts assigned on a non-notification basis worthless as security in the event of the subsequent insolvency and bankruptcy of the assignor.

²*Graham Paper Co. vs. Pembroke*, 124 Cal. 117, 56 Pac. 627 (1899); *City of Los Angeles vs. Knapp*, 7 Cal. 2d 168, 171, 60 P. 2d 127, 129 (1936).

³*Walling vs. Miller*, 15 Cal. 38 (1860); *McIntyre vs. Hauser*, 131 Cal. 11, 63 Pac. 69 (1900).

The California legislature immediately came to the aid of non-notification financing by enacting Civil Code Sections 3017-29, substituting recording of the assignment for notification to the account debtor as the means of perfecting the assignment against subsequent assignees.⁴ It is thus apparent that these Code Sections were prompted by the desire of the legislature to enable lenders engaged in non-notification financing to eliminate the risk that assignments taken as security might later be voided as preferential transfers.⁵ It is also clear that the legislature intended this recording statute to accomplish a second purpose; namely, to protect creditors of assignors and subsequent assignees against secret assignment. For, had the legislature merely wished to dispel the cloud cast upon non-notification financing by the *Klauder* decision, it need only to have provided that assignments became perfected against subsequent assignees when made. And, it need not have provided that recording should be the

⁴1943 Stats. 2542. Various amendments have since been made. 1945 Stats. 756 amended Sections 3017-22 and 3024. 1947 Stats. 2479 amended Section 3022. 1951 Stats. 3171 amended Section 3017-19. 1953 Stats. 2805 again amended Section 3017.

⁵For a full discussion of non-notification financing of receivables, the impact of the *Klauder* decision, and the State legislation enacted to counteract that decision see Koessler, "Assignment of Accounts Receivable," 33 *California Law Review* 40 (1945). See also the comment on the enactment of the California statute in 17 *Southern California Law Review* 303 (1944).

means of perfecting an assignment of an account against creditors of the assignor. For, theretofore assignments were perfected against the assignor's creditors when made.

There is then a dual legislative purpose to be considered in resolving the problems of statutory interpretation tendered. The first of these problems arises from the contention of defendant Bank that the receivables assigned to it did not constitute an account within the meaning of Civil Code Section 3019. At the time of the assignment, the term "account" as used in Section 3019 was defined in Section 3017 as follows: "'Account' means an open-book account, mutual account, or account stated, due or to become due, carried in the regular course of business, and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods, or services which in the regular course will result in an open-book account."

It would appear that the right assigned to defendant to receive the payments due the bankrupt under the construction contract constitutes an account as described by the last clause of the statutory definition. But, defendant urges that it does not because it is claimed that an express written contract such as that between the bankrupt and the State of California can never result in an open-book account except by specific agreement of the parties. In

support of this claim, defendant cites numerous cases in which open-book accounts were distinguished from other types of indebtedness for the purpose of determining the appropriate statute of limitations.⁶ These cases quite reasonably held that a written contract could not ordinarily result in an open-book account which could be the basis of an independent cause of action, apart from the contract, so that a suitor might avoid the bar of the statute of limitation applicable to suits on a written contract.

It is not logical to suppose that the legislature intended that open-book accounts should be judged by the same standards in determining the applicability of the recording statute as they would be in determining the appropriate statute of limitation. The last clause of Section 3017 obviously contemplates that an open-book account may arise in the regular course out of a contract, either oral or written. Indeed, it is likely that that clause was inserted in Section 3017 to make clear that the term "open-book account" was not to have the restricted meaning given it in the Statute of limitation cases. The holdings in those cases were based upon entirely different considerations of policy than those which

⁶*Parker vs. Shell Oil Co.*, 29 Cal. 2d 503, 175 P. 2d 838 (1946); *Tillson vs. Peters*, 41 Cal. App. 2d 671, 107 P. 2d 434 (1940); *Lee vs. DeForest*, 22 Cal. App. 2d 351, 71 P. 2d 285 (1937); *Stewart vs. Claudius*, 19 Cal. App. 2d 349, 65 P. 2d 933 (1937); *Mercantile Trust Co. vs. Doe*, 26 Cal. App. 246, 146 Pac. 692 (1914).

entered into the drafting of the recording statute. As has been noted, the recording statute was enacted both to aid and to regulate non-notification financing of accounts receivable. Consequently, it is reasonable to assume the legislature intended the statute to encompass the types of accounts receivable likely to be financed on a non-notification basis.⁷ Certainly, the mere fact that rights to receive payment for goods or services might have arisen from a written contract would not mean that the account debtor would necessarily be notified of their assignment.

In my opinion the term "open-book account" was used in the statute in the ordinary business sense of an indebtedness primarily evidenced or reflected by debit and credit entries in an account book. The construction contract between the State of California and the bankrupt normally would have and in fact did result in such an account. The contract provided for payment on a unit basis for the work done and materials furnished by the bankrupt. The bankrupt was entitled to progress payments based upon estimates of completed work made by State engineers. Appropriate entries were made in accounts main-

⁷See the discussion of the purpose of the recording statute in relation to the statutory definition of "account" in *Durkin vs. Durkin*, 133 C.A. 2d 283, 284 P. 2d 185 (1955). In that case the appellate court approved a holding, on facts substantially different from those in the present case, that an assigned account was not an "account" as defined in Civil Code Section 3017.

tained by the bankrupt, when these estimates were made, and again when payment was made by the State. The amount which had fallen due under the contract could not have been determined from the contract itself. Thus the accounts were more than a mere memorandum of the payments made which had been made on an indebtedness fixed by the terms of the contract. They were the primary evidence of the current indebtedness of the State to the bankrupt.

Defendant Bank next contends that even if the receivables assigned to it did fall within the general statutory description of an "account," they were excluded from the statutory definition by the proviso that an "account" should not be represented by "a judgment, note, draft, acceptance, or other instrument for the payment of money." In support of this argument, defendant cites *In re Richards*, 108 F. Supp. 259 (S.D. Calif. 1952) in which the Court held that an account arising out of a written contract was represented by an instrument for the payment of money. I cannot agree with the conclusion reached in that case. In my opinion, the term "other instrument for the payment of money" as used in the statute must be interpreted in the light of the specifically enumerated instruments, "judgment, note, draft and acceptance." A contract does not have the distinctive attributes of such instruments.⁸

⁸For a comment questioning the holding in *In re Richards*, see 41 California Law Review 333 (1953).

Defendant also notes that the statutory definition of “account” was amended in 1953.⁹ The amended definition provides that “ ‘Account’ does not include any debt arising under a contract for a work of improvement to real property as defined in Section 1182 of the Code of Civil Procedure or a public work of improvement as defined in Section 4200 of the Government Code.” The receivables assigned to defendant Bank would thus not be an “account” as presently defined. It is argued that the present definition does not represent a substantive change in the previous definition, but merely a clarification of language. The amendment is far too detailed and extensive to be a mere clarification. Moreover, ample reason existed in 1953 for a substantive change in the definition of “account.” A 1950 amendment to Section 60(a) of the Bankruptcy Act had eliminated the risk that an assignment might be voided by a trustee in bankruptcy as a preferential transfer merely because it had not been perfected against a subsequent assignee.¹⁰ Thus when the recording statute was amended in 1953 it was no longer needed to enable lenders engaged in non-notification financing to render assignments invulnerable to attack by trustees in bankruptcy. It remained only as a protection for subsequent assignees and the assignor’s creditors against secret

⁹1953 Stats. 2805.

¹⁰64 Stat. 24. See House Report 1293, 81st Cong., 2nd Session., 1950 U.S. Code Congressional Service 1985.

assignments. The legislature may have felt that this single purpose could be accomplished without requiring recordation of assignments of the types of receivables excluded from the statutory definition of "account" by the 1953 amendment.

Since the receivables assigned to defendant Bank constituted an account within the meaning of former Civil Code Sections 3017 and 3019, the failure to record the assignment rendered it invalid against creditors of the assignor. But, this conclusion is not dispositive of this cause. Defendant Bank contends that even though the assignment itself was not perfected against the assignor's creditors, neither they nor the trustee in bankruptcy can recover payments actually received by the Bank as a consequence of the assignment. Two alternative grounds are asserted in support of this contention. The first is that the payments received by the Bank were not collected directly from the bankrupt and thus were not received by the Bank under the assignment.¹¹ The second is that the recording statute merely prevents an assignee from asserting an unrecorded assignment against creditors of the assignor seeking to reach outstanding accounts receivable, and does not entitle creditors to recover from the assignee actual collections on assigned accounts.

The first ground has no merit. Without relating

¹¹It is not disputed, however, that one payment received by the Bank was received directly from the State. This argument, therefore, has no application to that payment.

all of the facts concerning the receipt of payments by the Bank, it is fair to say that the Bank had control of payments made by the State for work done under the construction contract from the moment the payments were made. Moreover, if the recording statute does permit creditors to recover from an assignee amounts collected as a consequence of unrecorded assignments, it seems clear that the fact that the assignor may have collected from the account debtor and in turn paid the assignee does not alter the situation. It has been noted that the recording statute is concerned with the financing of accounts receivable on a non-notification basis. And, when this type of financing is engaged in, it is expected that the assignor may collect from the account debtor on behalf of the assignee. It is also apparent from the content of the recording statute that it was designed to encompass this situation. That portion of the statute contained in Civil Code Section 3025 provides, among other things, that the assignor of an account shall be a trustee for the assignee of any proceeds of the account collected by the assignor.¹²

However, in my opinion, defendant Bank is correct in its claim that the recording statute does not enable creditors of the assignor of an unrecorded assignment to recover from the assignee sums actually collected pursuant to the assignment. In support of the contention that the statute does per-

¹²See the comment on Section 3025 in 17 Southern California Law Review 303 at 307 (1944).

mit such recovery, the Trustee relies principally upon the case of *Menick vs. Carson*, 96 F. Supp. 817 (S.D. Calif. 1951) which so holds.¹³ In that case the court pointed out that one of the purposes of the statute is "to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtor's financial position." Then the Court stated that "If the debtor secretly assigns his accounts and a creditor extends credit in reliance on the possession of the debtor of the accounts, the creditor has been deluded and may set aside the assignments. To say that the assignee may avoid this result by merely collecting the accounts is to present him with a device which would practically make the statute a nullity."¹⁴

In my opinion, the Court's conclusion is the result of an insufficient consideration of the practical aspects of the extension of credit in reliance on the debtor's possession of accounts receivable. Accounts receivable are constantly fluctuating assets. Any creditor is aware that an account will not ordinarily remain outstanding indefinitely, but in the normal course of business will be paid. Upon col-

¹³The Trustee also notes a decision made by Judge Roche of this Court, without opinion, in *Costello vs. H. B. Paint Co.*, Civil No. 30569, April 15, 1952. But, that decision, unexplained by any opinion, has no precedential significance here, since in that case the collections on the assigned account were made after the adjudication in bankruptcy. Thus considerations not present in this case may have entered into Judge Roche's decision.

¹⁴96 F. Supp. 817 at 819.

lection of the account, the debtor is free to dispose of the proceeds as he may see fit. When he has done so, his creditors cannot reach the proceeds unless perhaps as a preferential transfer if bankruptcy follows within four months. Credit is rarely extended in reliance on any particular accounts receivable, but rather on the amount of receivables which a business of a particular size and character may be expected to have continually outstanding. All that creditors can reasonably expect is to reach such outstanding accounts in the event of the debtor's insolvency or bankruptcy. The protection they need is against prior secret liens which will prevent them from sharing these assets of the debtor. As interpreted by the Court in *Menick*, the recording statute would do more than protect against secret assignments. It would place the assignor's creditors in a far more favorable position than if the assignment had never been made. The sums collected by the assignee pursuant to an unrecorded assignment would remain as sort of a perpetual fund on which prior creditors of the assignor could draw in the event of his eventual default on his debts to them. I do not believe the framers of the California recording statute ever intended such a result.

The language of the statute does not require it. At the time of the assignment, Civil Code Section 3019 merely stated that no unrecorded assignment of an account "shall be valid" as against creditors of the assignor or subsequent assignee, without

notice. On its face, this language means no more than that an unrecorded transfer of an account is ineffective against such creditors and subsequent assignees. Once the account is paid, however, it is extinguished. The fact that the account, itself, was never effectively transferred as against the assignor's creditors or subsequent assignees does not mean that the proceeds could not be.

It may be said that the recording statute was intended to protect not only the assignor's creditors but also subsequent assignees who can only be adequately protected by enabling them to recover sums collected by a prior assignee who did not record his assignment. This may be true. But, if the recording statute was intended to afford such protection to subsequent assignees, provisions of the statute other than Civil Code 3019 more reasonably spell out that intent. At the time of the assignment herein, Civil Code, Section 3018, established the relative priorities of the competing assignees, stating that the first in time should take precedence, except that if any of the assignments were recorded, the assignee who first recorded should have priority. It would be a fair interpretation of this provision, to say that an assignee with priority could recover from another assignee collections on the assigned account. To so interpret Section 3018 would result in a more logical application of the recording statute than to hold that such recovery would be permissible merely because an assignment was invalid under Section 3019. For if that were true, a

subsequent assignee who had never troubled to record his own assignment would be able to recover collections on the account made by the prior assignee. There would be no justification for so favoring the second assignee.¹⁵

Since at the time of the filing of the petition in bankruptcy, the account assigned by the bankrupt to defendant was no longer outstanding, and Civil Code Section 3019 did not entitle the bankrupt's creditors to recover the proceeds from defendant, the Trustee has no cause of action under Section 70(e) of the Bankruptcy Act. Judgment will therefore enter in favor of defendant upon findings presented pursuant to the Rules.

Dated: April 11, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 12, 1956.

¹⁵The California recording statute from the beginning set forth the rights of competing assignees of the same account in a very ambiguous manner. See the comments in 33 Southern California Law Review 303 at 309 (1944); 33 California Law Review 308 (1950). Apparently many of the numerous amendments to the statute were made in an attempt to clear up these ambiguities. However, a careful appraisal of these amendments in the light of the purpose of the recording statute makes it clear that the original provision of Section 3019 that an unrecorded assignment is not valid against a subsequent assignee, whatever it meant, certainly did not mean that a junior assignee could recover the proceeds of the account actually collected by a senior assignee who did not record his assignment.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause having been tried and submitted for decision, the Court now finds as follows:

1. William Jason Evans (hereinafter referred to as Bankrupt) was adjudicated a bankrupt on February 27, 1950, and plaintiff was thereafter appointed, and now is, trustee of the Estate of said bankrupt.

2. For some time prior to September 15, 1948, Bankrupt had been engaged in the construction business under the name of Evans Construction Company, and defendant Bank of America National Trust and Savings Association, a national banking association, (hereinafter called Bank), had from time to time, through its Berkeley Main Office, engaged in financing Bankrupt in his construction business.

3. On or about September 15, 1948, Bankrupt entered into a contract with the State of California, Department of Public Works, Division of Highways, to construct a bridge across Chamberlain Creek in Mendocino County. (Plaintiff's Exhibit 1.)

4. On September 15, 1948, Bankrupt executed an assignment to Bank of all monies due or to become due under the contract. The assignment was given to secure Bank for loans to be made to Bankrupt to

enable him to perform the contract. (Plaintiff's Exhibit 4.)

5. Glens Falls Indemnity Company, which had an assignment prior to that of Bank, by letter subordinated its rights thereunder to the rights of Bank under its assignment of September 15, 1948. (Plaintiff's Exhibit 5.)

6. No notice of intention to assign and no notice of assignment of said contract has ever been filed with the County Recorder of the County of Alameda, in which county Bankrupt maintained his principal place of business, or in any other county or at all.

7. Thereafter, Bank made the loans and advances upon the security of the assignment as follows on the following dates and in the following amounts:

No.	Notes	
1—September 16, 1948.....	No. 5916	\$ 3,000.00
2—September 21, 1948.....	No. 5959	2,000.00
3—October 2, 1948.....	No. 6075	1,000.00
4—October 11, 1948.....	No. 6118	3,000.00
5—October 23, 1948.....	No. 6141	2,000.00
6—October 30, 1948.....	No. 6296	1,500.00
7—November 8, 1948.....	No. 6344	1,500.00
8—November 15, 1948.....	No. 6400	2,000.00
9—November 22, 1948.....	No. 6460	700.00
10—November 29, 1948.....	No. 6526	500.00
11—December 4, 1948.....	No. 6594	400.00
12—December 13, 1948.....	No. 6679	1,200.00
13—December 20, 1948.....	No. 6794	1,500.00
Total		<hr/> \$20,300.00

Bankrupt maintained a regular set of books, including account receivable ledger in which, and on the Chamberlain Creek job account, were entered from time to time sums becoming due from the State of California for progress payments, and in which payment of such sums was also from time to time entered.

9. The State of California drew, issued, and delivered to Bank payments on account of said contract on the following dates and in the following amounts:

October 6, 1948.....	\$ 5,445.00
November 12, 1948.....	839.25
December 9, 1948.....	6,720.00
January 6, 1949.....	3,785.76
March 22, 1949.....	2,834.51
April 7, 1949.....	1,721.53
Total	<u>\$21,346.05</u>

Each of said warrants was made payable to "Bank of America NTS&SA assignee of Evans Construction Company" and was upon presentation duly paid.

10. Each of the warrants, except that of January 6, 1949, was deposited by Bank in the account at Bank entitled "Evans Construction Company, Special Account."

11. The loans and advances made by Bank were repaid from proceeds of the said assigned contract between Bankrupt and State of California.

1—October 11, 1948.....	\$ 5,445.00
(Notes 1 & 2 & 445 on account note with \$18.33 interest.)	
2—November 16, 1948.....	888.10
(On account note 7.)	
3—December 13, 1948.....	6,666.90
(Notes 4, 5, 10 and balance notes 3 & 7 with \$30.83 interest.)	
4—December 20, 1948.....	
(Balance due renewed by note No. 6747—\$7,300.00 and \$29.56 interest paid.)	
5—January 6, 1949.....	3,785.76
(On account note No. 6747.)	
6—March 22, 1949.....	1,834.51
(On account note No. 6747.)	
7—April 7, 1949.....	1,679.73
(Balance with \$69.09 interest.)	
<hr/>	
Total	\$20,300.00

12. Payments 1, 2, 3 and 4 above were by means of checks drawn by Bankrupt upon the "Evans Construction Company, Special Account." Payment 5 above was made by Bank negotiating a State of California Warrant dated January 6, 1949, and crediting the proceeds on account of note #6747. Payments 6 and 7 above were effected by Bank charging (debiting) the "Evans Construction Company, Special Account."

13. At the time of all of the transactions herein mentioned, and on September 15, 1948, Bankrupt had creditors who have filed proofs of claim in the bankruptcy proceedings, and who had no actual notice of the assignment by Bankrupt to Bank of monies to become due Bankrupt from the State of California under the contract.

From the foregoing findings of fact, the Court now makes the following conclusions of law:

1. The assignment of Bankrupt to Bank of September 15, 1948, was the assignment of an "account" within the provisions of Section 3017 of the California Civil Code as it then read and was void as against existing creditors, without actual notice thereof, of Bankrupt because no notice of intention to assign nor notice of assignment was filed as required by Section 3019, California Civil Code.

2. At the time of said assignment there were creditors of the bankrupt who had no actual notice of the assignment.

3. That notwithstanding the method of payment as set forth in Findings of Fact Nos. 11 and 12, the payments made by the State of California were received by the Bank under the assignment.

4. The assigned accounts were extinguished by payment by the State of California to the defendant prior to the filing of Bankrupt's petition in bankruptcy and were then no longer outstanding, by reason of which.

5. At the time of bankruptcy, the creditors of Bankrupt had no right to recover the proceeds of the assigned account from Bank, and plaintiff had no cause of action under Section 70(e) of the Bankruptcy Act against defendant Bank.

6. Judgment shall be entered herein in favor of defendant.

Dated: This 6th day of August, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 6, 1956.

In the Southern Division of the United States District Court for the Northern District of California

No. 31390

JOHN COSTELLO, as Trustee of the Estate of
William Jason Evans, Bankrupt,
Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Banking Association.

Defendant.

JUDGMENT

The above-entitled cause having been tried and submitted to the Court for decision and the Court having signed and filed herein Findings of Fact and Conclusions of Law,

It Is Hereby Adjudged that plaintiff have and recover nothing of defendant herein.

Let Judgment Be Entered Accordingly.

Dated: This 6th day of August, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed and entered August 6, 1956.

[Title of District Court and Cause.]

**MOTION FOR NEW TRIAL AND NOTICE
OF HEARING SAME**

To the Defendant Above Named and to Messrs.
Samuel B. Stewart, George Chadwick, Jr., and
H. H. Bechtel, Its Attorneys:

Comes now the Plaintiff above-named by and through his counsel of record and hereby moves the above-entitled Court for an Order granting a new trial of the above-entitled action on all of the issues joined herein and upon each and all of the following grounds:

1. Irregularity in the proceedings of the Court by which Plaintiff was prevented from having a fair trial.
2. Insufficiency of evidence to justify the decision and judgment of the above-entitled Court.
3. That the decision and judgment of the above-entitled Court is against law.
4. Errors in law occurring at the trial and excepted to by Plaintiff.

This motion is based upon all records, papers and files herein and upon the proceedings had before and minutes of the above-entitled Court and upon Rule 59 of the Federal Rules of Civil Procedure.

Dated at San Francisco this 8th day of August, 1956.

SHAPRO & ROTHSCILD,
By /s/ ARTHUR SHAPRO,
Attorneys for Plaintiff.

Further Take Notice that the foregoing Motion will be heard and determined by the above-entitled Court at the Courtroom of the Honorable Louis E. Goodman, Judge thereof, Room 258, U. S. Post Office and Courthouse Building, at 7th and Mission Streets, San Francisco, in said District, at the hour of 10:00 o'clock a.m., on the 14th day of August, 1956, or as soon thereafter as counsel can be heard.

Dated: August 8, 1956.

SHAPRO & ROTHCHILD,

By /s/ ARTHUR SHAPRO,

Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed August 9, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION
FOR NEW TRIAL

Ordered, that plaintiff's motion for a new trial be and the same is hereby denied.

Dated: August 15, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that John Costello, as Trustee of the Estate of William Jason Evans, bank-

rupt, plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 6, 1956.

Dated: This 16th day of August, 1956.

SHAPRO & ROTHSCHILD,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed August 17, 1956.

The United States District Court, Northern District
of California, Southern Division

No. 31390

JOHN COSTELLO, as Trustee of the Estate of
William Jason Evans, Bankrupt,

Plaintiff,

vs.

BANK OF AMERICA, NATIONAL TRUST &
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Defendant.

Before: Hon. Oliver J. Carter, Judge.

REPORTER'S TRANSCRIPT OF
PRETRIAL CONFERENCE

Appearances:

For the Plaintiff:

SHAPRO & ROTHSCHILD, by
ARTHUR P. SHAPRO, ESQ.

For the Defendant:

SAMUEL B. STEWART, JR.,
CHRISTOPHER M. JENKS and
H. H. BECHTEL, by
CHRISTOPHER M. JENKS, ESQ.

Thursday, October 14, 1954—10 A.M.

The Clerk: Costello vs. Bank of America.

Mr. Shapro: May it please the Court, we pretried most of this during your Honor's occupation with other matters, so I don't think we are going to take anywhere near as much time as estimated.

The Court: All right, Mr. Shapro.

Mr. Shapro: This action is based upon an amended complaint filed by the Trustee in Bankruptcy of the Estate of Evans, doing business as Evans Construction Company, for the recovery from the defendant of monies allegedly paid to and received by the defendant bank as a result of or as the proceeds of an assignment made to the bank by the bankrupt of monies payable to the bankrupt under two construction contracts.

The complaint is in two counts for that reason. One was a State of California contract. That is the subject matter of the first cause of action. And the second count is in connection with a construction contract undertaken by the bankrupt for the County of Shasta.

In other words, one is a county job, the other is a state job.

The jurisdictional elements and so forth in con-

nection with the matter have been in effect admitted by the pleadings. [2*]

It is proposed here, your Honor, as part of this pretrial conference to agree upon, and I think we have in effect agreed upon the method by which this matter may be presented to the court upon trial with a minimum of extraneous or oral testimony. We feel that the greater part of the issues involved can be demonstrated to the Court on trial by written documents. And we have many legal problems, but those I think had best be addressed to the trial judge after the record is completed. We had hoped in the first instance that the matter might be submitted even on a pretrial basis with a stipulated statement of facts. However, in justice to both parties I am afraid that is impossible. There are some questions of fact developed that are material to the defense, material to the case, and we can't do that.

We have discovered, your Honor, as a preliminary that we have made certain clerical errors in connection with the complaint which we desire to ask leave to amend upon the face because they are clerical, and Mr. Jenks on behalf of the defendant has indicated in our previous discussion that the defendant will ask for permission to file an amended answer. He does not have it ready.

However, the record may show that the plaintiff has no objection to the filing by the defendant of an amended answer—that is, without limitation as to the subject matter.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Now, if your Honor will examine page 4 of the amended [3] complaint, the third line, Paragraph III, the sum, the figure there, \$3,300.00, that figure should have been \$13,000.00.

The Court: You will see that is put in by interlineation?

Mr. Shapro: Yes, your Honor, if I might.

The Court: Mr. Clerk, Paragraph III, line 4, page 4, \$13,000 in lieu of \$3,300.

Mr. Shapro: The only other change required is in the prayer, first line, page 5, the figure \$20,000.00 should be \$20,300.00.

The Court: All right.

Mr. Shapro: The next line, the \$13,300.00 figure should be \$13,000.00.

The Court: Page 5, line 1——

Mr. Shapro: Yes.

The Court: ——the figure \$20,000 should be stricken and in lieu thereof should be inserted the figure \$20,300?

Mr. Shapro: Yes, your Honor.

The Court: Then line 2, page 5 of the complaint, in place of the figure \$13,300——

Mr. Shapro: Should be \$13,000 even.

The Court: \$13,000 even.

Mr. Shapro: The aggregate is the same, so that need not be changed.

The Court: Those amendments will be permitted.

Mr. Shapro: Now, the subject matter of Paragraph V of the [4] first count involves entry by the bankrupt into a contract with the State of California, which we will call for the lack of a better term,

a construction contract. Neither party, your Honor, as of this moment, has available a copy of the contract. Mr. Jenks and I have conferred as to—we are trying to avoid getting it from the State because it is a very, very, bulky document and most of it will be immaterial. We feel that a copy may be available in the local office of the bonding company that wrote the bond, and, if so, we will attempt to get it and have it at the time of trial; and, if not, we will jointly attempt to examine the files in Sacramento and pick out the pertinent parts of the contract, and obtain photostatic copies from the State, if we can. I am sure we will agree it isn't material to this issue that the contract in question that refers to the County of Shasta be available for the trial court.

The Court: How are you going to handle that in a pretrial order?

Mr. Shapro: I will say as far as a pretrial order is concerned that the contract would be supplied to the court by stipulation of counsel.

The Court: Is that satisfactory?

Mr. Jenks: Satisfactory.

Mr. Shapro: Yes, satisfactory, your Honor.

Now, the evidence in connection with the allegations of [5] Paragraphs VI and VII has in effect admitted the assignment. We would like to have the original of that assignment.

The Court: VI and VII of what count?

Mr. Shapro: First count, page 2.

The Court: All right.

Mr. Shapro: They are treated in the answer almost jointly. That is why I refer to them that way.

In other words, they don't admit it was a loan of \$20,000. They set forth that it was loaned in a series of amounts, but the aggregate is the same, and they admit the assignment of the contract.

If counsel for the Bank has either the original or a photostatic copy of the assignment, then, so far as we are concerned, that may be admitted in evidence in connection with the pretrial order.

Do you have that, Mr. Jenks?

Mr. Jenks: I believe we have photostatic copies. The originals are on file.

The Court: Is the authenticity of it going to be questioned?

Mr. Shapro: Not by us, no.

The Court: By either party?

Mr. Jenks: As I told Mr. Shapro, we will be glad to furnish him prior to the trial with photo copies of our photographs.

The Court: The point is, objections to competency, [6] relevancy and materiality are reserved. What I am trying to determine is whether there is going to be any question as to foundation, any question as to authenticity that will be raised by the parties? In other words, you want to narrow the issues, you don't have to lay any foundation. The only question then that remains: Is it competent, relevant or material.

Mr. Shapro: Yes.

Mr. Jenks: Yes.

The Court: That is reserved, but as to any objections to the document that it is not the best evi-

dence or anything of that sort, those are all to be determined in pretrial.

Mr. Jenks: That's correct.

Mr. Shapro: That's correct.

The Court: You are willing then that the order show that it may be subject to that objection?

Mr. Shapro: That it may be admitted subject only to those objections.

The Court: Is that correct?

Mr. Shapro: Yes.

The Court: The photostatic copy may be used in place of the original?

Mr. Shapro: That is also agreeable.

Now, with respect to the allegations of the answer to the amended complaint—I am referring to Paragraph III of the [7] answer, beginning at line 5 of page 2, wherein the dates and amounts of loans and payments are set forth; so far as the plaintiff is concerned we will be glad to waive any objections, including objections as to materiality, competency, relevancy of the banks' records by photostatic copy. Concerning the contents of the paragraph and with respect to the payments, I understand from Mr. Jenks that the bank expects to have available photostatic copies of the State warrants involved.

Mr. Jenks: We have copies of the State warrants, Mr. Shapro, but object only to your use of the photostatic copies. We will be glad to supply copies of our commercial ledger sheets and let you compare them with the original. However, those are bound monthly into bound volumes, and in order to make photostats I would have to tear the sheets out of the

bound volumes. We will make manual copies and then you may compare them with the originals.

Mr. Shapro: That is perfectly satisfactory.

The Court: The objection then to—all objections to the copies are waived?

Mr. Shapro: Yes.

Mr. Jenks: Yes.

The Court: Then the copies will be admissible in evidence.

Mr. Shapro: May we shorten time on this, Mr. Jenks, will the same documents and in the same form be available to us in [8] connection with the second count?

Mr. Jenks: That's correct.

Mr. Shapro: Then the same stipulation may cover the second count.

Well, I would say, your Honor, subject to correction by Mr. Jenks—I was going to say that we have covered about all we could on pretrial. I have one reservation.

In the answer, if your Honor please, the bank sets up that a prior assignment—the bank alleges prior assignment of the monies due the bankrupt under this contract with Glens Falls Indemnity Company, and also sets up that the bank received the consent of the Glens Falls Indemnity Company to the assignment to the bank.

I have told Mr. Jenks, and I think he agrees with me, that the assignment or purported assignment from the bankrupt to Glens Falls Indemnity Company is not available; I mean, we just haven't been able to find it. I have from the Glens Falls In-

demnity Company attorney, Thomas E. Davis, in response to my request for copy of the document itself, the assurances that it was on the regular form, printed form, of the Glens Falls Indemnity Company. I am perfectly willing, on behalf of the plaintiff, to use and stipulate that the assignment in question was in the form that the company has furnished to us, even though we don't even have a copy of the instrument.

I don't know how Mr. Jenks feels about it. [9]

Mr. Jenks: I will so stipulate, unless between now and the trial Mr. Davis finds us the original, and we will use it.

The Court: Subject to that exception, the stipulation may be made.

Mr. Shapro: And the document, which for brevity's sake may be called the consent of the Glens Falls to the assignment to the bank, has been furnished to us by photostatic copy by the defendant bank, and it is dated September 15, 1948, and we waive objections to its authenticity, and we also consent to its admission in evidence. We waive all objections to it.

The Court: That will be so ordered.

Mr. Shapro: So far as I know, your Honor, that represents about all that can usefully be done on a pretrial in this case.

Mr. Jenks: You have a rather interesting case here, your Honor—I am not going to argue the law, but I will mention the problem: First, whether a construction contract is an account receivable. That is the initial question.

And, second, assuming it is, how far back they can go to collect money which the bank received under it, because I know—we agree, all of us, that the bank's last receipt was 9 months before bankruptcy.

The Court: Isn't there just a case now down out of the Court of Appeals in the Southern District of California that involved this very question? [10]

Mr. Jenks: I haven't seen one out of the Court of Appeals from there yet. I think there are conflicting cases in the District Court.

The Court: Just in the advance sheets—I mean, in the slip sheets.

Mr. Shapro: We looked for it, but I haven't seen it.

The Court: It may not be on the precise question, but, as I recall it, the argument was between a trustee and the subcontractors of the main contractor as to whether or not the trustee was entitled to the money or——

Mr. Shapro: It may be; I am not familiar with the case.

The Court: They held that the subcontractor was entitled to the money, under that particular situation.

Mr. Jenks: We will look for it. Thank you.

The Court: I just read it last week.

Mr. Jenks: There are conflicting decisions from the Southern District, one by Judge Hall, one by Judge Mathes. I will use one, he will use the other.

Mr. Shapro: We don't consider them conflicting. one, when the time comes for the argument.

The only one, of course, that we think affects this case, is the one that is in our favor.

The Court: You can use the Courts of Appeal decision for what it is worth. I don't know whether it covers this point or not. [11]

Mr. Jenks: The reason I suggested we would like to amend and do it formally, Paragraph VII of both counts of the answer, Paragraph VII of the first count of the answer on page 4, and Paragraph VII of the second count of the answer which appears on page 7, as originally drawn the complaint demanded from the bank the full amount which had flowed through the bank. As amended, they are now only demanding the amount which was used by the bank to pay off its loans. I think possibly the larger allegation is unnecessary but therein it could be argued where they allege the state in one case and the county in the other paid the bank and where we admit that we received money from the State that it was an admission that the bank had received it as the bank. So we would like leave to amend.

We may get a little evidentiary, as Mr. Shapro knows, in the Shasta deal. The warrants were bailed to the bank as assignee, but all the money was deposited in the general account. In the State, the warrants were bailed to the bank as assignee, but, with one exception, they were deposited in a special account which the bonding company required.

So I would like to file an amendment to those two Paragraphs VII which may set forth a little evidence, but I think is necessary to clear up the situation.

The Court: Mr. Shapro?

Mr. Shapro: We have no objection. [12]

The Court: And how much time do you want?

Mr. Shapro: You name it.

Mr. Jenks: Let's say 10 days. That would be a week from next Monday.

Mr. Shapro: That's satisfactory.

The Court: Who will prepare the pretrial order?

Mr. Shapro: I guess I better do it.

The Court: If you will submit it to Mr. Jenks for his approval, and, after approval, I will make the order.

Certificate of Reporter

I (We) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 13 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/

[Endorsed]: Filed April 27, 1955. [13]

In the District Court of the United States, for the
Northern District of California, Southern Division

No. 31390

JOHN COSTELLO, as Trustee of the Estate of
William Jason Evans, Bankrupt,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

SHAPRO & ROTHSCHILD, by
ARTHUR P. SHAPRO, ESQUIRE, and
DANIEL ARONSON, JR., ESQUIRE.

For the Defendant:

GEORGE CHADWICK, JR., ESQUIRE,
ELDON C. PARR, ESQUIRE.

October 18, 1955—10:00 o'Clock A.M.

The Clerk: John Costello, as Trustee of the
Estate of William Jason Evans, Bankrupt, versus

Bank of America, National Trust and Savings Association, on trial.

Mr. Shapro: Ready for the plaintiff, your Honor.

Mr. Chadwick: Ready for the defendant.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Shapro: Arthur P. Shapro, of Shapro & Rothschild, and Daniel Aronson, for the plaintiff, your Honor.

Mr. Chadwick: George Chadwick and Eldon C. Parr for the defendant, Bank of America, your Honor.

The Court: Proceed.

Mr. Shapro: Your Honor, this is an action that is now based upon an amended complaint to set aside the transfer of accounts receivable by the bankrupt to the defendant Bank of America.

The action is predicated upon the provisions of the Civil Code, principally Sections 3,017, 3,018 and 3,019, as though sections read and were in force at the time of this transaction.

Those sections, in brief, your Honor, provide a means by which assignments of accounts receivable may become the subject of public notice, and therefore to eliminate the so-called secret lien or assignments of accounts receivable [3*] without the knowledge of creditors.

The complaint is in two counts and refers to two successive assignments by the bankrupt to the Bank of America of monies due or to become due to him,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

he being a general construction contractor; one, in the first count, from the State of California on what will be commonly termed here during the course of the trial, your Honor, the Chamberlain Creek job, and the second, in the second count, the assignment of proceeds of money due or to become due to him as contractor on a job done in the County of Shasta, which is referred to as the Pittville or Pitt River job.

The assignment to the Bank of America in count number one is dated and made, and the pleadings admit, that it was made September 15, 1948. The bankruptcy in this case did not take place until February 27, 1950.

This is not a preference action in any sense of the word. This is strictly an action under Section 70(e) of the Bankruptcy Act by which the trustee is vested with the right to set aside any transfer which, under any law, State or Federal, would be voidable by a creditor of the bankrupt. That is the basic jurisdiction of these causes of action.

The first count, which involves \$20,300.00——

The Court: Prior to 1948, under the California Code, did they have a right to set aside this transfer?

Mr. Shapro: Yes. [4]

The Court: On what grounds?

Mr. Shapro: On the ground that the defendant failed to comply with the provisions of Section 3017, called a notice of intention to assign accounts receivable. That, incidentally, the failure to record, is admitted in the pleadings. There is no issue on that.

To sum up, your Honor, there are innumerable defenses—I mean legal defenses. I don't know whether there are any tangible defenses or not. We have had a pretrial. We have more or less agreed on a substantial part of the factual evidence in the case.

The Court: What did the creditor have to show under the California section to set aside a transfer of accounts receivable on the ground that the statutory proceedings had not been followed?

Mr. Shapro: He would have to show, first, that he was a creditor at the time, or that he became one prior to that time; that at the time he became a creditor he had no knowledge of the accounts receivable assignment.

Now, there are other aspects to it with respect to if he became a creditor after the assignment, but without notice of the—I mean, prior to the time of the notice, prior to the recordation of the notice. Similar to the unrecorded mortgage situation.

That doesn't apply in this case because, your Honor, we [5] intend to prove——

The Court: But, Mr. Shapro, what did he have to show besides the fact that he was a creditor at the time and that the statutory procedures were not complied with?

Mr. Shapro: He would also have to show that the defendant was paid the money or so had the uncollected accounts receivable under the assignment. That is all. The question of solvency or insolvency is not involved in this action at all.

The Court: What does the creditor accomplish under that section?

Mr. Shapro: He sets aside the transfer. In other words, it is voidable as to him.

We are relying, to a great extent, your Honor, upon the only known reported case on the subject, at least the only one that we know of, in which these various questions that your Honor is asking me were answered by Judge Burn in the Southern District of California in the case of Menick versus Carson.

The Court: I didn't mean to have you get into a law argument. I was trying to find out what the picture is.

Mr. Shapro: Yes. Well, it is very similar—As your Honor knows, an unrecorded mortgage, during the period it is off the record, is void as to any creditor, or at the instance of any creditor who was a creditor at the time the mortgage was given or who became such prior to the recordation of the mortgage. [6]

Nothing else is required. In other words, you don't have to prove insolvency; you don't have to prove reasonable cause to believe. You don't have to prove anything else but the fact that the statutory requirement for, in this case, assignments of accounts receivable or, in the case of the mortgage, the actual mortgage itself.

The Court: So that if the assignment were set aside on the ground that the statutory procedures were not complied with——

Mr. Shapro: It would redound to the benefit of the estate.

The Court: ——it would not belong to the assignee and would become by succession the property

of the trustee in bankruptcy?

Mr. Shapro: Right. There is an issue, and I think this is as good a place as any to point it out to your Honor, there is an issue and a serious issue between the plaintiff and the defendant as to whether or not these contracts or the proceeds of the contracts which were collected by the bank—we say pursuant to the assignment, they say regardless of the assignment—whether or not it was a type of an account as defined by the statute, which is Section 3018 of the Civil Code, which is the subject of the regulatory statute.

In other words, they contend, as I understand it, that this is not the type of account—and I use the word “account” because it is defined in the statute and that is the basis of this action—they say it is not the type of account which [7] could be the subject of the statute, and therefore they didn’t have to comply with the statute. That is one of the principal issues in the case.

Your Honor will note from the Answer—and I am not undertaking to make a statement for the defense, but your Honor will note from the Answer, and I am referring now to Paragraph III of the Answer to the Amended Complaint, the Bank denies that the money was loaned prior to the 15th of September; but further on in the paragraph they admit and indicate clearly the dates of the loans which they made pursuant to what they allege to be an agreement to finance the bankrupt in connection with the Chamberlain Creek job.

That is the \$20,300.00 over a period of 13 different

loans, evidenced by 13 different notes, numbered as the paragraph in the Answer indicates.

They also admit in that same paragraph the payments and how they were applied with respect to the various notes. We will undertake to prove, as I believe the statute on which we rely requires, that these payments were made to them pursuant to and they acquired this money by virtue of payments pursuant to assignments.

Obviously, your Honor, if they didn't get the money, payments of these notes, as a result of or pursuant to the assignment, we would have no cause of action against the bank, because they received this money more than five months prior [8] to the commencement of the bankruptcy proceedings.

At this time, your Honor, I think it wise because we are going to get very shortly into the only controversial phase of the case that I know of on the facts, to make a motion at this time, your Honor, to dismiss the second count of the complaint entirely.

I might state that the reason for so doing is because we have become convinced by reason of the documentary evidence furnished us by the Bank, the defendant, and also documentary evidence found upon the records of the bankrupt in this case, two things: First, that the \$3,500.00, or the amount involved in the second cause of action, was actually both loaned and paid back to the bank prior to making of the assignment, so obviously that could not possibly be the subject of recovery.

And we have also ascertained with respect to the second count that the two other payments, the

\$7,000.00 and the \$2,500.00 payment, which is admitted in Paragraph IV of the Answer with respect to the second count, we have come to the conclusion that those payments were made out of the general account of the bankrupt in the Bank, the Bank of America, into which the gross proceeds of the checks from the County of Shasta were deposited by the Bank.

In other words, we do not feel we can prove an identity of funds sufficient to charge the Bank as having received the two payments in December and January, under or by virtue of the [9] assignment in question.

So we ask leave of Court to dismiss the second count.

The Court: I suppose counsel has no objection to that?

Mr. Chadwick: No, your Honor.

The Court: All right. The second count may be dismissed.

Mr. Shapro: Now, we will also undertake to prove to your Honor that there were creditors of the bankrupt in existence whose debt arose prior to September 15th, 1948, the date of the assignment of the Chamberlain Creek job, which creditors are still creditors and whose claims have not since been paid.

We will also undertake to show, your Honor, not only that the monies due or to become due under this construction contract were to be and could be, as the statute says—it becomes an accounts receivable in the ordinary course of business. We will prove that it did in fact become an account receivable as the

statute and the cases in California have determined an account receivable to be.

In substance, your Honor, I believe that represents the plaintiff's view of this case.

The Court: Do you wish to make a statement now?

Mr. Chadwick: Only briefly, your Honor, I would like to indicate my view.

I agree with Mr. Shapro as to the issues which we face here. In the first place, as he suggests, there is an issue [10] of fact as to whether, with respect to the first count of the complaint, the trustee represents creditors who, at the time of this transaction, were in a position to attack these assignments. That is a factual question.

Now, our primary position, your Honor, is that the monies to become due from the estate under the contract, which is involved now, did not represent or result in an account which was within the California statute requiring notice of assignments of such account to be made.

In the second place, our next contention is, your Honor, that notwithstanding that situation, in this instance the accounts which were assigned were actually paid by the bankrupt's obligor, which puts us in an entirely different situation than many of the cases.

In this cause, the trustee is seeking to recover back from the Bank monies which the Bank actually received in payment and discharge of bankrupt's obligation, and, as Mr. Shapro says, there is no question of preference involved here at all. We

think that puts a different complexion on the matter.

The Court: The plaintiff has to show that the money by which the obligation was paid was the proceeds of the account receivable?

Mr. Shapro: That is right.

Mr. Chadwick: Well, I don't think there is any factual question, your Honor, but the question is a legal one. That is, [11] the assignment which may have been vulnerable to attack by these creditors was the assignment of monies to become due from the State in the performance of this contract.

Now, while these creditors would have the right to attack that transaction so long as those accounts which had been assigned remain unpaid, it is our further position that the accounts have been in fact been paid; there was nothing for these creditors to set aside, as it were.

The account, if you concede it to be an account for the purpose of this argument, no longer existed but had been paid.

The Court: You mean at the time these people became creditors?

Mr. Chadwick: No, subsequently, your Honor. There is conflict in the authorities on this proposition, your Honor, but I merely wanted——

The Court: That is not quite clear to me what you mean by that.

Mr. Chadwick: Your Honor, there are cases holding in a situation of this kind with respect to assignments of accounts receivable, that when the trustee in bankruptcy comes in, standing in the

shoes, as it were, of some of these creditors who existed at the time of the transaction, he is entitled to set aside the transaction insofar as the accounts remain outstanding and unpaid, and therefore to acquire whatever interest the bankrupt had in those still unpaid accounts. [12]

Those cases make a clear distinction that insofar as those accounts which in fact have been paid are concerned, the trustee has no right of recovery. We will cite cases to your Honor of that proposition.

Now I think, your Honor, that represents the controversy that exists between us here.

The Court: You mean by that that some of the courts have held that the only thing that is reachable in this type of proceeding is the unpaid assignment payment?

Mr. Chadwick: Yes, your Honor, exactly.

The Court: Well, do you have some evidence? What did you agree to on the pretrial?

Mr. Shapro: Well, we didn't agree to any facts, your Honor. The pretrial order merely simplified the order of proof. We didn't actually agree on any particular facts.

The Court: Well, you put on what you have to put on, then.

Mr. Shapro: Thank you, your Honor.

Mr. Evans, please.

WILLIAM JASON EVANS

called as a witness on behalf of the plaintiff; sworn:

The Clerk: Will you please state your name to the Court?

A. William Jason Evans.

Direct Examination

By Mr. Shapro:

Q. Where do you live, Mr. Evans?

A. Walnut Creek. [13]

Q. What is your business or occupation, sir?

A. I am employed by the Henry Kaiser Company.

Q. In what capacity? A. Engineer.

Q. And in the years 1947, 1948 and 1949, what was your occupation?

A. I was a general contractor.

Q. And you are the bankrupt in the proceedings pending in this court based upon a petition filed by you on February 27, 1950, is that correct?

A. Yes, that is correct.

Q. And at and before that time, did you do business under a trade name?

A. Evans Construction Company.

Q. In the course of your business as Evans Construction Company, or as a general contractor, in the year 1948, did you have occasion to do business with the State of California? A. Yes.

Q. And what type of business was it?

A. It was a bridge construction job.

Q. And was it a job awarded as the result of competitive bidding? A. Yes, it was.

(Testimony of William Jason Evans.)

Q. Was there a written contract entered into between you and the State on this job? [14]

A. Oh, yes.

Q. And may I say that the job we are talking about is called the Chamberlain Creek job.

A. Yes.

Mr. Shapro: (Handing document to counsel.)

Q. I show you, Mr. Evans——

The Court: Well, there is no objection, is there?

Mr. Chadwick: No, we have no objection.

The Court: Just have it marked.

Mr. Shapro: We will offer in evidence at this time the contract for the Chamberlain Creek job, being State contract No. 14-D-C-36.

(Thereupon, the contract was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. (By Mr. Shapro): Mr. Evans, I am going to show you two books. Can you tell me what these books are? Not the contents but just the nature of the books.

A. These are the ledger and accounts receivable and accounts payable. All the books pertaining to our construction work.

Q. When you say they are books pertaining to your construction work, you mean the Evans Construction Company for the period of 1948 and 1949?

A. Yes.

Mr. Shapro: May these books be just marked for identification, your Honor, please? [15]

The Court: Yes.

(Testimony of William Jason Evans.)

(The books of account referred to were marked Plaintiff's Exhibits Nos. 2 and 3 for identification.)

Mr. Chadwick: Which is which?

Mr. Shapro: The general ledger will be No. 2 and the journals will be No. 3.

Q. Now, Mr. Evans, in addition to the work done for the State of California in connection with this contract, which is now Plaintiff's Exhibit 1, did you do other construction work during the year 1948?

A. Yes, there was the Pitt River job we had going at that time.

Q. I am not referring only to the time that the Chamberlain Creek job was running, but during the whole year 1948 did you do other jobs?

A. I don't recall. I don't think so. I am not quite positive.

Q. Did you do in 1947 other jobs? A. Yes.

Q. Did you do in 1949 other jobs? A. Yes.

Q. Were the transactions evidenced by the jobs that you did, so far as the financial phase of it is concerned, to your knowledge entered in these books that have been identified?

A. That is correct, they were. [16]

Q. And were the jobs done for the State of California, the Chamberlain Creek job, so far as you know, entered in the books in any different way than the other jobs?

A. No, they were entered the same way, only they had a job number assigned to them.

(Testimony of William Jason Evans.)

Q. Now, referring your attention, Mr. Evans, to the year 1948, and to the date September 15th, which is the date that the contract was let on this Chamberlain Creek job, and also the date it has been admitted you assigned the proceed of that contract to the Bank of America, referring your attention to that date, can you tell the Court whether or not at that time you owed money to any persons which monies were still owing at the time of your bankruptcy in 1950?

A. I think there was two or three creditors that I owed money to.

Q. Would the schedules filed by you in this court, Schedule A of your creditors, refresh your memory as to the identity of any such creditors?

A. I think it would.

Q. I show you, Mr. Evans, the schedules filed by you, one of these triplicate originals filed by you in this court on February 27, 1950, and particularly to Schedule A-3 thereof, which is the list of unsecured creditors.

Will you examine that list, please, and tell the Court which of those creditors listed had claims which arose prior [17] to September 15, 1948?

The Court: And which were in existence at that time?

Q. (By Mr. Shapro): And which continued to be owed by you until the date of your bankruptcy.

A. I think A. J. McCosker is one of them.

Q. What is the name? A. A. J. McCosker.

Q. And how much did you owe him at the time

(Testimony of William Jason Evans.)

of your bankruptcy which you also owed him prior to September 15th, 1948?

A. A hundred dollars is listed here.

And the J. H. Hein Company of Redding.

Q. How much? A. I think that was——

Q. (Interposing): How much did you owe the J. H. Hein Company at the time of your bankruptcy which was owing since the time prior to September 15, 1948? A. We have listed here \$168.48.

Then there is Frank Ragland.

Q. How much was that?

A. He had a note for \$3,000.00.

Q. Which arose prior to September 15, 1948?

A. Yes, that was before that date.

Q. Any others, sir?

A. None that I can recall offhand here.

Q. Do you want to look at it carefully? [18]

A. That is all I am sure of. There may be some others that I am not sure of until I dig into the records.

Q. All right. Now, Mr. Evans, after the assignment of the monies due or to become due under this Chamberlain Creek contract to the Bank of America, you received advances from the Bank, did you not?

A. That is correct.

The Court: He hasn't testified yet that he assigned it. Is that stipulated?

Mr. Shapro: Well, that is stipulated to. In fact, one of the documents involved in the pretrial I will offer in a moment, which is the assignment itself, your Honor.

(Testimony of William Jason Evans.)

The Court: All right.

Mr. Shapro: That is one of the few things we did accomplish in the pretrial.

Q. After the monies were advanced, you started the job, did you? A. That is correct.

Q. And progress payments were made by the State from time to time, is that right?

A. Monthly, yes.

Q. Now, will you tell the Court, please, how those payments were handled? By that I mean as to whom did the checks or the warrants from the State go.

A. Well, they went directly to the Bank. [19]

Q. They went directly to the Bank? And how were the payments made on the loans that the Bank had made to you in connection with this Chamberlain Creek job?

A. Well, Mr. Dodson would call me up. He is one of the officials of the Bank of America, in Berkeley. He would call me up and tell me he had some money for me, and so I would go up and take my check book with me, and we would sit down to his desk and we would write out—we would pay the Bank of America the amount of money that was due them, and then we would go over and get my receipt for the deposit of the rest of the money.

Q. In other words, Mr. Evans, is this the fact: that you were called by Mr. Dodson over to the Bank, the Bank had a check from the State there, a warrant from the State, is that right?

A. I imagine it was there. I never saw it.

Q. You never saw it? A. No.

(Testimony of William Jason Evans.)

Q. And at his request you drew a check to the bank for a given amount?

A. That is correct. I would go over to the loan window and pay my loan and go to another window and get my receipt for the deposit.

The Court: The warrants then were deposited to your account?

Mr. Shapro: I am going to get to that in a minute.

The Court: All right. [20]

Mr. Shapro: I will get to that in a moment, if you don't mind.

The Court: All right.

Q. (By Mr. Shapro): To what account, if you know, was these warrants credited by the Bank?

A. Well, they were credited to our—well, to our general account, which was the only account we had.

Q. This is the State job, Mr. Evans? This is the State job now?

A. Pertaining to the Chamberlain Creek job.

Q. This was the State job, then?

A. That was credited to our account, the account which the bonding company had, and it required a counter signature on the check for any money to be withdrawn.

Q. As a matter of fact, Mr. Evans, there were two accounts of yours in the Bank at that time?

A. That is correct.

Q. One was the general account and one was called a special account?

A. That is right.

(Testimony of William Jason Evans.)

Q. This special account was an account in which a counter signature besides yours was required?

A. That is right. That as pertaining to this job.

Mr. Shapro: At this time, if your Honor please, I will offer in evidence the assignment from Evans to the Bank, dated [21] September 15th, or photostatic copy of it.

The Court: Very well.

(Thereupon, the assignment was admitted into evidence as Plaintiffs' Exhibit No. 4.)

Q. (By Mr. Shapro): I am going to show you, Mr. Evans, a photostatic copy of a letter dated September 15, 1948, addressed to the Bank of America and signed by the Glens Falls Indemnity Company, and also purporting to be signed by you, and ask you first if that is your signature or a photostat of your signature.

A. That is right.

Q. Will you read this document, and after you have read it, tell the Court whether or not that is the document as a result of which the special account was opened.

Mr. Chadwick: Mr. Shapro, so far as the Bank is concerned, I am willing to admit that that was the document which resulted in the creation of the Evans Construction Company special account.

Mr. Shapro: We will accept the stipulation, sir. We will offer it in evidence, then, the September 15th letter.

(Thereupon, the letter dated September 15, 1948, was admitted into evidence as Plaintiff's Exhibit No. 5.)

(Testimony of William Jason Evans.)

Q. (By Mr. Shapro): You ultimately completed the job, is that right? A. Yes.

Q. And full payment was made by the [22] State? A. That is correct.

Mr. Shapro: I have no further questions of this witness at this time, your Honor.

Cross-Examination

Mr. Chadwick: Will you bear with me just a moment, your Honor?

(Discussion between counsel off the record.)

Mr. Chadwick: Your Honor, in order to avoid the necessity of examining the witness, I will ask Mr. Shapro now to stipulate that the three items to which Mr. Evans testified as being amounts owed by him prior to September 15, 1948, to several creditors, and which were remaining owing at the time of his bankruptcy, were the items of \$100.00, \$168.48, and \$3,000.00, and that he had at that time no other creditors.

Mr. Shapro: Now, I am willing to stipulate, as counsel says, with one qualification. That is, I think, purely a legal one.

In the course of this trial the indemnity agreement executed in favor of the Glens Falls Indemnity Company will be brought in. We are going to bring it in. We are going to take the position as a matter of law that the indemnity agreement having been executed prior to the assignment, the indemnity agreement from the bankrupt to Glens Falls In-

(Testimony of William Jason Evans.)

demnity Company having been executed and entered into prior to the assignment, even though the bonding company didn't pay any loss on that job [23] until after the assignment, is still, as a matter of law, an obligation of the bankrupt's sufficient to give strength to this particular type of case.

In other words, I am not going to ask you to stipulate to any amount, but I want to qualify that. I don't ask you to stipulate that Glens Falls is a creditor. I wouldn't do that.

Mr. Chadwick: I understand.

Mr. Shapro: I want this stipulation as to these three creditors to be subject to that qualification.

Mr. Chadwick: That is agreeable to me, your Honor.

The Court: Very well.

Mr. Shapro: Thank you.

Mr. Chadwick: I have no questions. Witness excused.

Mr. Shapro: Mr. Mendelson.

SAMUEL MENDELSON

called as a witness on behalf of the witness; sworn:

The Clerk: Will you please state your name to the Court?

A. Samuel Mendelson.

Direct Examination

By Mr. Shapro:

Q. Mr. Mendelson, what is your occupation?

A. I am a certified public accountant.

(Testimony of Samuel Mendelson.)

Q. Practicing in San Francisco? A. Yes.

Q. For some years past? A. Yes. [24]

Q. At the request of the trustee in this case, did you make an examination into a portion of the records which are now marked for identification as Plaintiff's Exhibits 2 and 3? A. Yes, I did.

Q. That is the two books.

Mr. Shapro: For the information of Court and counsel, I am going to direct these questions to the content of Paragraph III of defendant's answer.

Q. Mr. Mendelson—— A. Yes, sir?

Q. Do you find in the books of Mr. Evans that you have before you records of the loans from the Bank of America on the Chamberlain Creek job?

A. Yes, sir.

Q. And do those books—withdraw that.

In what account do you find that entry?

A. Sir? In what account?

Q. What account? Well, withdraw that.

In what book or record do you find that?

A. I have before me the record of cash received from the Evans Construction Company, and there are a series of notes listed in that record from the Bank of America, and various dates upon them.

Q. Now, using September 16th, 1948, as the beginning date, and December 20th, 1948, as the ending date—— [25] A. Yes, sir.

Q. Do you recall having at my request checked the items that are in the defendant's Answer against the books? A. Yes, I did.

(Testimony of Samuel Mendelson.)

Q. And did you find that the \$20,300.00 referred to in the Answer was entered in the defendant's books on or about the dates and in the amounts set forth in the Answer? A. Yes, sir.

Q. To what account in the general ledger, if any, were those advances transferred from the cash receipts?

A. They were posted to the account described as notes payable.

Q. Notes payable? Now, did you also find among the records of the bankrupt that you have before you, the evidence of the payments referred to in Paragraph III of the Answer, namely, payments beginning October 11, 1948, and ending April 7, 1949? A. Yes, sir.

Q. And in what account did you find the primary evidence of those payments?

A. This was recorded in the cash received record of the Evans Construction Company, and the items are debited or charged to the Bank with the indication "Special," and they are credited to the account described as accounts receivable. From this record they were then transferred to "Cash in Bank," in an asset account, and the credit was credited to the account described as accounts receivable, also an asset. [26]

Q. Now, the accounts receivable item that you have referred to, did that refer to the Chamberlain Creek job? A. Yes.

Q. State of California? A. Yes.

Q. And are the items of payments beginning Oc-

(Testimony of Samuel Mendelson.)

tober 11, 1948, and ending April 7, 1949, as indicated by the Bank as having been received by them, all entered in the accounts receivable account of the bankrupt on the Chamberlain Creek job?

A. Yes, sir.

Q. Will you point out, please, Mr. Mendelson, the accounts receivable on the Chamberlain Creek job, what you have termed an account receivable on the Chamberlain Creek job in these books?

A. This is the account described as "State of California, Division of Highways," and the items that were in question from the Answer as it was given to me, are starting with the sales register, indicating September 20, \$5,445.00, was charged to the account. This came about from an entry from the sales register where the items were debited to accounts receivable and credited to sales, and then subsequently a payment is recorded therein.

Q. Well, am I correct, Mr. Mendelson, for the purpose of brevity, in stating that the so-called account receivable from the Chamberlain Creek job was account No. 32 in the accounts [27] receivable ledger of Evans Construction Company?

A. Yes, sir, it is.

Q. And consisting of how many pages?

A. The account indicated 32 is the general ledger description for accounts receivable, and this is the subsidiary record therein, "State of California, Division of Highways."

Mr. Shapro: I wasn't trying to minimize the record, your Honor and Mr. Chadwick.

(Testimony of Samuel Mendelson.)

Q. In other words, the account to which we are addressing our attention consists of two pages on which entries appear on a total of three sides?

A. Yes, sir.

Q. Will you take that out? A. All right.

Mr. Shapro: Mr. Chadwick, I have apparently mislead the witness and the Court. The account on the third page under "State of California" is the Division of Architecture. It is a different job. The Division of Highways is a different job consisting of only one sheet written on two sides.

Mr. Chadwick: Very well.

Mr. Shapro: We will offer that ledger sheet, accounts receivable sheet, in evidence.

Mr. Chadwick: No objection.

(Thereupon, the foregoing ledger sheet was marked Plaintiff's Exhibit No. 6 in [28] evidence.)

Q. (By Mr. Shapro): As I understand it, then, Mr. Mendelson—you correct me if I am wrong——

A. Yes, sir.

Q. As the State made payments, they were credited to the account receivable which is now in evidence, and they were charged from the sales records previously, substantially the amount that was subsequently paid by the State?

A. Yes, sir. There was a little short—The final amount that was set up by Mr. Evans as due from the State was slightly over what the State paid.

(Testimony of Samuel Mendelson.)

There was a difference of a couple of hundred dollars.

Q. Then that portion, if any, of the monies that the Bank of America received on account of its loans, as indicated in the Answer and the ledger sheet and the cash record you referred to, was also entered in the books as a debit to the note payable to the Bank, is that right? A. Yes, sir.

Mr. Shapro: I think that is all I have of this witness.

Cross-Examination

By Mr. Chadwick:

Q. Mr. Mendelson, again referring to this Plaintiff's Exhibit 6—— A. Yes, sir?

Q. ——would you indicate to me—you referred to an item of September 20th?

A. Yes, sir. [29]

Q. Of \$5,445.00? A. Yes, sir.

Q. Representing a charge or debit to this account? A. Yes, sir.

Q. Would you indicate to me what the origin of that item of \$5,445.00 is?

A. Yes, sir. that is the posting right here, sir (indicating). This is described as "Record of sales, page 11, September, 1948," and here is the posting. It is indicated as Job No. 481-2, would be the second payment, and under date of 9/20, Division of Highways, State of California, \$5,445.00. This is the debit to accounts receivable, and this is the counter credit to sales.

(Testimony of Samuel Mendelson.)

Then from this record you would post, in summary form, this total to the accounts receivable in the general ledger and credit to sales in the general ledger, and then you would take the individual page, as it is here in your sales register letter, \$5,445.00, State of California, Division of Highways.

Q. Let me ask you, Mr. Mendelson, this sales register account, does that represent invoices or billings by Evans Construction Company?

A. I would assume that it was, sir. That is the normal bookkeeping accounting procedure, when you bill a customer, to put it through a sales register where the totals are posted to both the general ledger and the subsidiary account.

Q. But you don't know whether in this particular instance [30] that was the manner in which these entries to the sales register originated?

A. May I ask you a question, sir? You mean, do I actually see a billing——

Q. Yes.

A. ——or a bill head of some sort? No, sir, I did not.

Q. But your testimony is as an accountant?

A. Yes, sir. That the general procedure would be that.

Q. Now, I would like to know, too, Mr. Mendelson, I understand that the entries to the accounts receivable account, Plaintiff's Exhibit 6, in total differed in minor degrees from the amount ultimately paid to Evans Construction Company under this

The Court: All right.

Mr. Shapro: May I have one moment, your Honor? I want to check with the Complaint.

Mr. Chadwick, will you stipulate with me to take my statement in lieu of testimony, which I will be glad to give if you prefer it, that the funds of the bankrupt estate are insufficient to pay the claims of creditors in full?

Mr. Chadwick: Certainly I will so stipulate.

Mr. Shapro: That is in the necessary allegations of our complaint. Thank you.

May I recall Mr. Evans for a moment, your Honor?

WILLIAM JASON EVANS

recalled; previously sworn:

Redirect Examination

By Mr. Shapro:

Q. When or after you gave this assignment on the Chamberlain Creek job to the Bank of America on September 15, 1948, did you notify any of the three creditors whose names you have mentioned, Hein, McCosker or Ragland, of the fact that you had made such assignment to the Bank of America?

A. No, I didn't notify anyone. [33]

Mr. Shapro: That is all. Thank you.

(Witness excused.)

Mr. Shapro: Now, may I call as an adverse witness the representative of the Bank, please?

The Court: All right.

J. LYON

called as an adverse witness on behalf of the plaintiff; sworn:

Direct Examination

By Mr. Shapro:

Q. Please state your name to the Court:

A. My name is J. Lyon.

Q. And your first name?

A. The initial "J."

Mr. Shapro: May the record show, your Honor, the witness is being called as an adverse witness under the rule?

Q. You are employed by the Bank of America?

A. That is correct.

Q. In what capacity?

A. I am in charge of the note department there.

Q. What branch?

A. Berkeley Main Office.

Q. Now, did you have charge of the note account on the Chamberlain Creek job for Evans?

A. No, I did not.

Q. You did not have. Do you have the records of that account with you? [34]

A. I believe they are here, yes.

Mr. Chadwick: (Handing document to the witness.)

Q. (By Mr. Shapro): Mr. Lyon, from the records of the Bank can you tell us how the payments received by the Bank on the notes numbered 1 and 2, namely the loans 5916 and 5959, were paid to the Bank?

(Testimony of J. Lyon.)

A. You mean where the proceeds came?

Q. Yes.

A. Well, in reviewing the documents, the way these were credited was that when we would receive a warrant from the State it was applied to this commercial account.

Q. A special account? A. Right.

Q. Let's be sure, now. When you say "commercial" in this case, you are talking about that of the two commercial accounts which is designated "special," right? A. That is correct.

Q. Then the first two notes, namely, Nos. 5916 and 5959, were paid to the bank how?

A. The payment of \$5,445.00.

Q. And the payment of notes——

The Court: Well, he didn't answer your question as to where the proceeds came from.

Mr. Shapro: He said it came from the \$5,445.00. You see, your Honor, it has on page 2 of the Answer, line 27—— [35]

The Court: I have that.

Mr. Shapro: You have that before you?

The Court: Yes.

Q. (By Mr. Shapro): That amount, that identical amount, was received from the State of California, was it not, on October 6? Turn the page. We are using the same piece of paper.

A. I don't know whether that was one amount or not.

Q. Well, would you look at the next page of the

(Testimony of J. Lyon.)

sheet you were looking at, and I think you will find that it is? A. Are you on page 2?

Q. I am on page 2 that lists the 13 notes; right?

A. Yes.

Q. Now, at the top of the next page it shows the amount of the State of California warrant and the date you received it. A. Oh, yes.

Mr. Shapro: This was information furnished me by the bank, your Honor.

The Witness: That is right.

Q. (By Mr. Shapro): So that the warrant for \$5,445.00 was received by the bank from the State of California on October 6, 1948, right?

A. That is correct.

Q. And you have just testified that the two notes, 5916 and 5955, were paid to the bank on October 11, 1948, from that [36] \$5,445.00?

A. That is correct.

Q. Now, on November 12, 1948, the bank received a warrant from the State for \$839.25, right?

A. Um-hum.

Q. And on November 16, 1948, \$888.10 was applied against Note No. 7, is that correct?

A. That is correct.

Q. And on December 9, 1948, the bank received a warrant from the State for \$6,720.00, right?

A. That is right.

Q. And on December 13, 1948, the bank applied a payment of \$6,666.90 to Notes 4, 5 and 10, and cleared the balance then owing on Notes 3 and 7, with interest? A. That is right.

Q. On January 6th, 1949, the bank received a

(Testimony of J. Lyon.)

warrant from the State for \$3,785.76, which warrant it applied to Note 6747, is that right?

A. That is right.

Q. In other words, that particular warrant, namely, the January 6th one for \$3,785.76, was not deposited in the special account at all, was it?

A. No, it wasn't.

Q. It was applied directly to the loan?

A. Yes. [37]

Q. Now, on March 22, 1949, the bank received a warrant from the State for \$2,834.51, right?

A. Right.

Q. And on the same date, March 22nd, 1949, \$1,834.51 of that was applied on Note 6747?

A. Correct.

Q. And the last payment the bank received was warrant on April 7, 1949, from the State, for \$1,721.53, which on the same date was applied to the extent of \$1,679.73 as a balance of principal and \$69.09 interest on the last of the notes outstanding?

A. That is right.

Q. And it is true, is it not, Mr. Lyon, that the last two payments, namely, \$1,834.51 and \$1,679.73, were acquired by the bank by a debit to the special account?

A. Yes, that is right.

Q. And then, just so that the Court will have a clear picture, the other payments, that is, the payment denominated 1, 2, 3 and 4, on your Honor's Answer—payments denominated 1, 2, 3 and 4, were received in the form of a check signed by Evans, drawn on that special account?

(Testimony of J. Lyon.)

A. That is right.

Q. And the warrants that you have identified on approximately the same dates were deposited and credited to the special account on the same date by the bank? [38]

A. Yes.

Mr. Shapro: No further questions.

Mr. Chadwick: I would suggest, Mr. Shapro, inasmuch as you have been working from this memorandum, that it has not been amplified and clarified to the allegations, that we adopt it as a partial stipulation of fact.

Mr. Shapro: I have no objection to so doing. It might aid the Court.

Mr. Chadwick: You might put it in a little better form for the Court.

Mr. Shapro: Well, that is all right.

The Court: Do you want to just mark it in evidence?

Mr. Shapro: I think we can take these two sheets off. We have spare copies. It might aid your Honor in the consideration of the case.

The Court: Well, these last papers may be marked for identification in amplification and explanation of the witness' testimony.

(Thereupon the document referred to was admitted into evidence as Plaintiff's Exhibit No. 7.)

Mr. Shapro: That is all.

(Witness excused.)

Mr. Shapro: Plaintiff rests.

The Court: Well, what is in the record to show where there was publication? [39]

Mr. Shapro: There is an admission in the pleadings that the statute was not complied with.

The Court: Oh.

Mr. Shapro: That is expressly admitted in the pleadings.

The Court: Then before we proceed further we will take a brief recess.

(Short recess.)

Mr. Chadwick: If your Honor please, I think we can submit this matter on the case as it has gone thus far, with one possible exception.

Will you stipulate, Mr. Shapro, that the payments that were made by the State of California on this Chamberlain Creek job, that the State warrants were drawn payable to the Bank of America, NT&SA, assignee of Evans Construction Company?

Mr. Shapro: I will so stipulate.

Mr. Chadwick: And each of those were so made payable?

Mr. Shapro: I will so stipulate.

Mr. Chadwick: Your Honor, I don't think it is necessary for us to produce any further evidence here. I believe the entire matter is now laid out in the record.

Mr. Shapro: Submitted.

The Court: Both sides submit the present record, then?

Mr. Shapro: Yes, your Honor.

Mr. Chadwick: Yes, your Honor.

The Court: Would you like to make some statements about [40] the matter?

Mr. Shapro: Well, your Honor, if I may, I don't think this is the type of case—subject to your Honor's wishes, of course—that much can be contributed by oral argument or statement in the case. As you can see, there is very little conflict so far as the evidence is concerned.

There are serious questions of law involved. This is an important case from the standpoint of the administration of a bankrupt estate. It is equally important, I am sure, from the angle of good banking practice, and as to the effect of this statute.

It is my suggestion, your Honor, if it meets with your approval and that of counsel, that this matter be considered by your Honor on briefs, with a little more than normal time to be allowed, because we have discussed this matter for three years.

In other words, we have exchanged legal views with counsel and his predecessor, so we know pretty much what the other fellow's points are. We have done considerable research, I think on both sides, in connection with the matter, and I feel—I can't speak for Mr. Chadwick—

The Court (Interposing): What do you want to do, make a sort of a guinea pig out of this case?

Mr. Shapro: Oh, no, no, no.

The Court: So far as I can see, there is only about [41] thirty-two or three hundred dollars involved.

Mr. Shapro: Oh, no, your Honor. We are not

limited to recovery for the creditors. The United States Supreme Court has held if it is void as to one, it is void as to all. We are not confined to only thirty-two hundred dollars.

The Court: All creditors can share?

Mr. Shapro: Yes, all the creditors can share. At least, that is our position.

Mr. Chadwick: That I won't concede.

Mr. Shapro: We know you won't concede that.

The Court: However, that wouldn't make any difference if there could be a recovery.

Mr. Shapro: I appreciate that.

The Court: You might be able to use it all up for administrative expenses.

Mr. Shapro: If it were only \$3,200.00, I might get away with that. But as far as we are concerned, we would like, your Honor, to submit the matter upon briefs. We would have to make our prima facie showing on the authorities, as well.

The Court: Is there any question you are raising as to the statute itself?

Mr. Chadwick: Yes, your Honor.

Mr. Shapro: Oh, yes.

The Court: You mean as to the validity of it?

Mr. Chadwick: No, as to its application to this particular [42] case.

The Court: I gather from what you said that the contention you are going to make is that it doesn't apply in the case of an account?

Mr. Shapro: An account such as this.

The Court: Failure——

Mr. Shapro: Yes, that is one of the big points in the case.

Mr. Chadwick: Yes, that is the first point.

Mr. Shapro: Yes.

The Court: You mentioned there was some division on that?

Mr. Chadwick: Well, your Honor, as I recall, there is a case out of the Southern District, decided in 1952, in re Richards, which is the only case I have seen which involves the construction of this California statute, and on the facts it isn't by any means on all fours with the factual situation here.

Mr. Shapro: There is another case out of the Southern District of California which, from our standpoint—that is Menick versus Carson—in which the judge considered all of the questions that have been raised by counsel this morning—all of them, including the applicability of this statute to the posting of accounts receivable collected by the assignee prior to the consideration of filing suit.

The Court: The California statute must be not too old. [43]

Mr. Shapro: 1947, I think.

Mr. Chadwick: 1945.

(Discussion between Court and counsel off the record.)

The Court: All right, submitted. 20, 20 and 10.

(Thereupon this matter was submitted and the case adjourned.)

CERTIFICATE OF REPORTER

I, Official Reporter, certify that the foregoing transcript of 43 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed September 12, 1956. [43-A]

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1952

Mar. 31—Filed complaint—issued summons.

* * *

1953

May 19—Filed amended complaint.

July 1—Filed answer of defendant to amended complaint.

* * *

1955

Aug. 11—Filed amendment to answer to amended complaint

Aug. 11—Filed substitution of George Chadwick, Jr., as counsel for Bank of America.

* * *

Oct. 18—Court trial. Plaintiff's motion to dismiss count two of complaint granted. Evidence and exhibits introduced, memos ordered filed 20-20-10 days, and case continued to December 9, 1955, for submission. (Judge Goodman.)

1956

Apr. 12—Filed memorandum opinion and order for judgment. (Judgment for defendant. Counsel to present findings, conclusions and judgment.) (Judge Goodman.)

* * *

Aug. 6—Filed findings and conclusions.

Aug. 6—Entered judgment—filed Aug. 6, 1956—
for defendant.

Aug. 7—Mailed notices.

Aug. 9—Filed notice and motion by plaintiff for
new trial, Aug. 14, 1956.

Aug. 14—Ordered after hearing, motion for new
trial submitted. (Judge Goodman.)

Aug. 15—Filed order denying motion for new trial.

Aug. 17—Filed notice of appeal by plaintiff.

Aug. 17—Filed appellant's designation of record on
appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States
District Court for the Northern District of Cali-

fornia, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Amended Complaint.

Answer to Amended Complaint.

Pretrial Order.

Substitution of Attorney.

Amendment to Answer to Amended Complaint.

Opinion and Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Motion for New Trial.

Order Denying Motion for New Trial.

Notice of Appeal.

Designation of Record on Appeal.

Reporter's Transcript of Proceedings, October 14, 1954.

Reporter's Transcript of Proceedings, October 18, 1955.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of September, 1956.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15,321. United States Court of Appeals for the Ninth Circuit. John Costello, as Trustee of the Estate of William Jason Evans, Bankrupt, Appellant, vs. Bank of America National Trust & Savings Association, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 26, 1956.

Docketed October 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15,321

JOHN COSTELLO, Trustee of the Estate of
William Jason Evans, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Appellee.

APPELLANT'S CONCISE STATEMENTS OF
POINTS TO BE URGED ON APPEAL

Comes now John Costello, Appellant herein, and in accordance with Rule 17 (6) of the Rules and Practice of the United States Court of Appeals for the Ninth Circuit, specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Judgment made and entered by Hon. Louis E. Goodman, Judge of the United States District Court for the Northern District of California, on August 6, 1956, and more particularly specified and described in Notice of Appeal heretofore filed with the Clerk of said District Court on August 17, 1956, as follows:

That the conclusions of law Nos. 4 and 5 are not supported by the evidence and are contrary to the law in that

I.

That the District Court in said Judgment erred in finding that once the account is paid pursuant to the unrecorded assignment, it (the account) is extinguished.

II.

That the District Court in said Judgment erred in holding that Plaintiff could not recover from Defendant the proceeds of the unrecorded assignment already collected by Defendant.

Dated: October 10, 1956.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By /s/ DANIEL ARONSON, JR.,

Attorneys for Appellant, John Costello, Trustee of
the Estate of William Jason Evans, Bankrupt.

[Endorsed]: Filed October 12, 1956.



No. 15,321

United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, as Trustee of the Es-
tate of William Jason Evans, Bank-
rupt, *Appellant*,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

SHAPRO & ROTHSCHILD,
155 Montgomery Street, San Francisco 4, California,
Attorneys for Appellant.

DANIEL ARONSON, JR.,
155 Montgomery Street, San Francisco 4, California,
Of Counsel.

FILED

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No. 15,321

**United States Court of Appeals
For the Ninth Circuit**

JOHN COSTELLO, as Trustee of the Es-
tate of William Jason Evans, Bank-
rupt, *Appellant,*

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant filed a complaint in the United States District Court for the Northern District of California, Southern Division (Tr. p. 3) to set aside a transfer of accounts receivable pursuant to the provisions of Section 70e of the Bankruptcy Act (11 U.S.C.A. 110e). The District Court rendered its judgment in favor of appellee (Tr. p. 48) (141 F. Supp. 225). Pursuant to the provisions of 11 U.S.C.A. 47, appellant filed his notice of appeal on August 16, 1956 (Tr. p. 50), which notice of appeal was timely filed (11 U.S.C.A. 48).

STATEMENT OF QUESTION PRESENTED.

Where accounts receivable, assignment of which was void for failure to comply with the provisions of Section 3019 of the Civil Code of the State of California, have been collected by the assignee thereof more than four months prior to the bankruptcy of the assignor, may the trustee of the assignor's bankrupt estate, pursuant to Section 70e of the Bankruptcy Act, recover from the assignee the amounts collected from the assignee under such void assignment?

STATEMENT OF FACTS.

On September 15, 1948, the bankrupt entered into a contract with the State of California to perform work and services and to supply materials in the construction of a public work known as the Chamberlain Creek job (Tr. p. 75; Plaintiff's Ex. 1). The contract was assigned to appellee on the same day (Plaintiff's Ex-4). There was no notice of intention to assign accounts receivable filed, as required by Section 3019 of the California Civil Code. At the time of the assignment, the bankrupt had certain creditors who were still creditors at the time of the filing of the original petition in bankruptcy. These facts were so found in support of appellant (Findings No. 3 and 4, Tr. p. 43; Finding No. 6, Tr. p. 44; Finding No. 13, Tr. p. 46).

The trial court found that the indebtedness from the State of California to the bankrupt was an "account" within the meaning of Section 3017 of the California

Civil Code (Finding No. 7, Tr. pp. 44-45), and that the loans and advances made by appellee to the bankrupt and which were secured by the assignment of the "account" in question were repaid to appellee from the proceeds of the said assigned contract between bankrupt and the State of California (Finding No. 11, Tr. p. 45).

ARGUMENT.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT COULD NOT RECOVER BECAUSE THE ACCOUNT HAD BEEN EXTINGUISHED BY PAYMENT.

See 4 *Collier on Bankruptcy*, 14th Ed., Section 70.71 page 1348, where it is stated:

"It is well settled that under Section 70e(1) any transfer, lien, encumbrance, obligation or other transaction affecting the bankrupt's property, fraudulent as to a creditor under the applicable state (or federal) law, may be avoided by the Trustee in Bankruptcy. This is made doubly clear and reinforced by the terms of Section 70a(4)" (Citing cases).

The Trustee in Bankruptcy, under Section 70a(4) of the Bankruptcy Act (11 U.S.C.A. 110a(4)) is vested by operation of law with the title of the bankrupt to . . . "property transferred by him in fraud of his creditors", and (5) to property "including rights of action which prior to the filing of the petition he could by any means have transferred . . .". If the assignment in question is invalid, void or voidable as to any creditor under the state law to be hereafter

discussed, it is recoverable by the trustee under Section 70e (11 U.S.C.A. 110e) of the Bankruptcy Act, which reads, in part, as follows:

“Section 70. *Title to Property.*

e.(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.”

The court found that the assignment of accounts receivable herein in question was an account within the meaning of Section 3017 of the Civil Code of the State of California (Finding No. 7, Tr. p. 45 and Conclusion No. 1, Tr. p. 47), which then read as follows:

“Section 3017. (Definitions). In this chapter

(1) “‘*Account*’ means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account.

(2) “‘*Assignment*’ shall include any transfer, pledge, mortgage or sale.

(3) “‘*Creditor*’ means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) “ ‘*Debt*’ means the indebtedness owing to an account.

(5) “ ‘*Debtor*’ means any person by whom an account is owing to the assignor.

(6) “ ‘*Filing officer*’ means that county recorder of the county in which the assignor has its principal place of business within this State, or if the assignor has no place of business within this State then the county recorder of the county in which the assignor resides.”

and that there was no notice of intention to assign or notice of assignment as required by the then provisions of Section 3019 of the Civil Code of the State of California which then read as follows:

“*Requisites of assignment and notice.* No assignment of an account shall be valid as against present or future creditors of the assignor without notice of such assignment or as against a subsequent purchaser or assignee of such account without notice of such assignment:

... Unless there shall be on file in the office of the filing officer, at the time of the execution of such assignment, or prior to the time when credit is extended to the assignor or prior to the time when a subsequent assignment is made, as the case may be, a presently effective and uncanceled notice signed by the assignor and the assignee, containing:

A designation of the assignor and the assignee, and of the chief place of business of each within this State, if any, and if either of them has no place of business within the State, a designation of his residence or chief place of business outside the State and a designation of the general nature

of the business out of which such accounts arise; and, either

(a) A statement that the assignor expects to assign or has assigned an account or accounts then existing or thereafter arising to the assignee, or

(b) A statement that the assignor expects to assign or has assigned, certain specified accounts in which event the statement may contain:

(1) A list of the accounts so to be assigned, setting forth the amount of each account and the names and addresses of the persons owing the same; and

(2) If such accounts are to be assigned, as collateral security for a specific obligation, a declaration to that effect, and a statement of the amount of such obligation.”

Appellant agrees with all of the findings made by the trial court, and appellee has taken no appeal from any of these findings and conclusions, and therefore the sole question before the court is whether the collection of the account by the assignee extinguished the accounts with the result that the Trustee in Bankruptcy has no cause of action under Section 70e (Conclusions Nos. 4 and 5, Tr. p. 47). *American Trading Co. v. Steele*, 274 F. 774.

The only other reported decision directly on this subject is the decision of Judge William Byrne of the United States District Court for the Southern District of California, in the case of *Menick v. Carson*, 96 F. Supp. 817, where the question was thoroughly analyzed and the court reached its decision in favor of appel-

lant's position. We quote from the decision as follows, commencing on page 819:

“ . . . If, as the defendant claims, the plaintiff is limited merely to a right to set aside assignments of accounts that are outstanding or unpaid the very purpose of the statute would be defeated. That purpose is to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtor's financial position. If the debtor secretly assigns his accounts and a creditor extends credit in reliance on the possession of the debtor of the accounts, the creditor has been deluded and may set aside the assignments. To say that the assignee may avoid this result by merely collecting the accounts is to present him with a device which would practically made the statute a nullity.” (Italics ours.)

“We think the proper construction of this statute is to make its protection available to all existing or ‘present’ creditors, i.e., those creditors who extend credit prior to the assignment of the accounts, and only to those ‘future creditors’ who extend credit after the assignment, but before recordation or collection of the account by the assignee.”

“The creditor who extends credit after the accounts have been collected has not been deceived, because proper investigation will disclose that there are no accounts. The creditor who extends credit subsequent to the unrecorded assignments, but prior to the extinction of the accounts through collection, may set aside the assignments and if the accounts are collected subsequent to the accrual of his right he may resort to the proceeds.”

“... such a construction preserves the purpose of the statute without distorting it into a weapon in the hands of creditors who have in no way been prejudiced by the assignment. Also it brings Section 3019 into complete harmony with Civil Code Secs. 2957 and 3440, and is consistent with the manifest policy of the law with regard to secret liens. (Citing *Ruggles v. Cannedy*, 127 Cal. 290, and *Palmer v. Howard*, 72 Cal. 293, 13 P. 858.”

“Section 3019 is but one more link in a chain fashioned by the Legislature for the protection of creditors against the evils of secret liens and the secret disposal of assets to the detriment of those who presumably relied on the existence of these assets when they extended credit. In *Bank of America NT&SA, v. Sampsell*, 9 Cir. 114 F. 2d, 211, the Court noted that the California courts have construed Section 2957 in pari materia with Section 3440. Since Section 3019 deals with the same general subject and has the same purpose, it should be construed in pari materia with Sections 2957 and 3440.”

“Section 3440 is aimed at protecting creditors against the secret disposal of personal property. For obvious reasons it expressly excepts choses in action which would include the type of accounts with which Section 3019 is concerned. In enacting Section 3019 to protect creditors from secret disposal of certain kinds of accounts, the Legislature seemingly chose this method because Section 3440, by its very nature, could apply only to tangible personalty. Section 3440 provides, in part, that ‘every transfer of personal property, other than a thing in action. * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not

accompanied by an immediate delivery, * * * to be fraudulent and therefore void, against those who are his creditors while he remains in possession * * * and the successor * * *.' "

"Thus we see that the California courts and the Federal courts applying California law have given Sections 2957 and 3440 a harmonious application in order to effectuate the single policy which underlies both. We are satisfied that Section 3019 is in paria materia with both of those sections, and must be given a similar construction." (Italics ours.)

Judge Bryne clearly shows that he treats the assignment of accounts receivable section as "secret lien" legislation, and that the District Court in the instant case so considered it is apparent from the reading of its opinion and order for judgment (Tr. pp. 27-42).

As we have pointed out, *Menick v. Carson* is the only reported decision directly in point. However, both this court and the Supreme Court of the State of California, in the cases to be hereafter discussed, have ruled on the Trustee in Bankruptcy's right to recover where there had been a seizure and sale by the mortgagee under a chattel mortgage void under the laws of the State of California. The law relative to chattel mortgages is also "secret lien" legislation and is completely analogous to the law involved in the case at bar, and is also authority for the Trustee's right to recover pursuant to the state law under Section 70e of the Bankruptcy Act. The Supreme Court of the United States has permitted the Trustee to recover in an action involving a fraudulent pledge as will be discussed below.

In *England v. Moore Equipment Co.*, 94 F. Supp. 532 (affirmed by this court, 185 F. 2d 1019), the court held that where a chattel mortgage was executed and was valid by compliance with the state law, but that thereafter the lien of the mortgage was lost by the removal of the personal property to another county for more than thirty days, and where the property was thereafter seized by the mortgagee and sold, that the Trustee in Bankruptcy could recover the proceeds of the sale. Although the trustee in that case proceeded under the preference section of the Bankruptcy Act, the language of the court is very plain that the mortgagee was nothing more than a general creditor by reason of the failure to comply with the Civil Code sections relating to chattel mortgages.

In *Noyes v. Bank of Italy*, 206 Cal. 266,¹ the Supreme Court of the State of California also followed the same rule with regard to an invalid chattel mortgage and stated as follows:

“Even if it be assumed that a mortgage void as to creditors pursuant to the plain terms of the statute could be transformed into a valid mortgage by the mortgagee seizing the mortgaged property or by otherwise taking possession of the same with

¹Reversing *Noyes v. Bank of Italy* (District Court of Appeal), 259 Pacific 60, where the court, at page 63, said:

“Appellant offered to prove that possession of the chattels, under the terms of the mortgage, was taken by the appellant bank, and after compliance with the Code relative to the sale of mortgaged chattels as a pledge, the chattels were sold, which taking, possession, and sale occurred sometime prior to the adjudication of Paul Petrich, a bankrupt, and the appointment of respondent as trustee; offered as evidence the chattel mortgage, containing the affidavit of the mortgagor and the mort-

the consent of the mortgagor and thus shut out general creditors or creditors not possessing a lien or armed with process, yet we are satisfied that it was the intention of the Bankruptcy Act to safeguard the rights of such general creditors by giving the trustee the status of a lien creditor and also to prevent the mortgagee from defeating the rights of the creditors of the bankrupt by contending that such creditors were general creditors only. It seems reasonable to conclude, also, that the purpose of the Bankruptcy Act in vesting power in the trustee to attack a chattel mortgage void under the statute was to render ineffectual as to creditors the act of the mortgagee in taking possession of the property before the commencement of the bankruptcy proceedings. In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceeding, be entitled to attack the alleged void mortgage and to enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc." (1 Collier on Bankruptcy, 12th Ed., p. 728 et seq.)

The Court of Appeals for the 6th Circuit reached the same conclusion in *Lemmen v. Timmer*, 89 Fed. 2d 1011, affirming 19 F. Supp. 687.

gatee, that the mortgage was made in good faith and without design to hinder, delay, or defraud creditors, being devoid only of the acknowledgment, and that the mortgage was good as between the parties. This evidence under the objection of respondent was excluded from the record. These issues were not tried, and this judgment cannot stand until they have been tried and determined adversely to appellant's position. The judgment must be reversed, and upon a new trial permission should be granted defendant to establish, if it can, the validity of its mortgage between itself and the owner, and it is accordingly so ordered."

In another analogous situation, the Supreme Court of the United States upheld the Trustee in Bankruptcy's right to recover under Section 70e of the Bankruptcy Act in the case of *Buffum v. Peter Barceloux Company*, 289 U.S. 27, 77 L.Ed. 1140. In that case there was a pledge found to be fraudulent as to creditors, and the Trustee was permitted to collect the value of the property transferred where the transferee had transferred the property to a third person.

From the foregoing decisions with regard to the trustee's rights to recover the proceeds of transactions invalid by reason of the failure to comply with the secret lien legislation of the State of California, it seems apparent that the District Court was in error in refusing to permit the trustee to collect the proceeds of the void assignment, since by so doing the District Court permitted the appellee to obtain benefits pursuant to an invalid assignment contrary to the rulings of this court in *England v. Moore Equipment Co.*, supra, of the Supreme Court of the State of California in *Noyes v. Bank of Italy*, supra, and of the United States Supreme Court in *Buffum v. Peter Barceloux Company*, supra. To follow the District Court's theory we contend would be contrary to public policy generally and to the expressed legislative policy against "secret liens", because it obviously results in a race between the assignee under a void or voidable assignment and the institution of bankruptcy proceedings and/or actions by the trustee or creditor to avoid such assignments. It puts a premium on the diligent (though fraudulent) assignee at the expense of the creditors who because

of the noncompliance by such assignee with the provisions of Section 3019 of the Civil Code had no knowledge of the constructively fraudulent assignment. The reading of the provisions of Section 70e in conjunction with the provisions of Section 70a makes it clear that the laudable purposes of the Uniform Assignment of Accounts Receivable Act are substantially defeated by the strained construction which the District Court has placed upon the transaction in question.

CONCLUSION.

In view of the facts and law hereinabove set forth it is appellant's contention that the District Court erred in holding that the payment of the assigned account prior to the filing of the bankrupt's petition in bankruptcy extinguished the obligation, and that appellant had no cause of action under Section 70e of the Bankruptcy Act, and that therefore the judgment of the District Court, August 6, 1956, should be by this court reversed, with instructions to the lower court to enter judgment for appellant as prayed.

Dated, January 30, 1957.

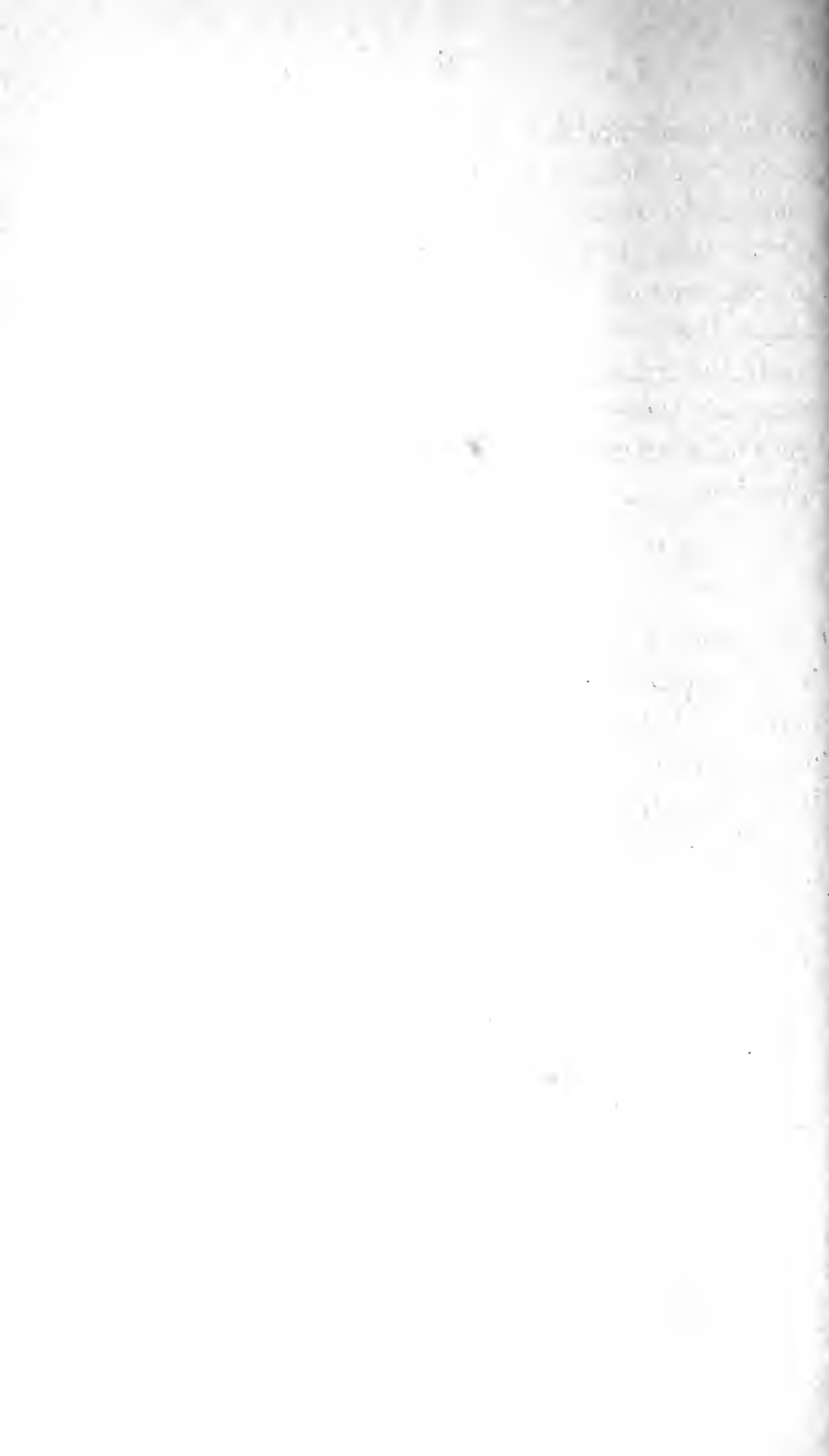
Respectfully submitted,

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No. 15,321

United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, as Trustee of the Estate of William Jason Evans, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association,

Appellee.

APPELLEE'S BRIEF.

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FILED

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PAUL P. O'BRIEN, C

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United States Court of Appeals For the Ninth Circuit

JOHN COSTELLO, as Trustee of the Es-
tate of William Jason Evans, Bank-
rupt, *Appellant*,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, a national
banking association, *Appellee*.

APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

Appellant filed a complaint (Tr. p. 3) and an amended complaint (Tr. p. 8) in the United States District Court for the Northern District of California, Southern Division, to recover money paid to Appellee (part of which was paid by the State of California under an assignment and part of which was paid by the bankrupt), pursuant to the provisions of Bankruptcy Act § 70e. (11 U.S.C.A. § 110e.) The District Court filed its Opinion and Order for Judgment (Tr. p. 27) (141 Fed. Supp. 225) and rendered its judg-

ment in favor of appellee. (Tr. p. 48.) Pursuant to the provisions of Bankruptcy Act § 24 (11 U.S.C.A. § 47) appellant filed a notice of appeal on August 16, 1956, (Tr. p. 50), which notice of appeal was timely filed within the limitation fixed by Bankruptcy Act § 25. (11 U.S.C.A. § 48.)

STATEMENT OF QUESTION PRESENTED.

Where an assignment of money due, or to become due, under a written contract with the State of California is made to secure repayment of money loaned without the filing of a Notice of Assignment under California Civil Code § 3019 and all loans made are repaid (some by the assignor, and some by collection under the assignment) more than four months before the bankruptcy of the assignor, may the assignor's trustee in bankruptcy recover either the payments made by the bankrupt or the money collected under the assignment?

STATEMENT OF FACTS.

On or about May 25, 1948, the bankrupt entered into a contract with the State of California for the construction of a bridge across Chamberlain Creek about 17½ miles west of Willits. (Plaintiff's Exhibit 1; admitted, Tr. p. 75.) On September 15, 1948, appellee, through its Berkeley main office, undertook to finance the bankrupt in the performance of said contract and as security took an assignment of money due or to become due under said contract. (Plaintiff's

Exhibit 4; admitted, Tr. p. 81.) The bankrupt had previously assigned the rights under said contract to Glens Falls Indemnity Company from which appellee obtained a subordination agreement. (Plaintiff's Exhibit 5; admitted, Tr. p. 81.) Between September 16, 1948, and December 21, 1948, appellee made various loans to the bankrupt as appears from the top half of the first page of plaintiff's Exhibit 7. (Admitted, Tr. p. 97.) From time to time, as the work progressed, warrants drawn by the State Controller payable to "Bank of America National Trust and Savings Association, assignee of Evans Construction Company" were issued. (Plaintiff's Exhibit 7.) The amount of each such warrant is set forth on page two of plaintiff's Exhibit 7. With the exception of the warrant dated January 6, 1949, in the amount of \$3,785.76, each warrant was deposited in the bankrupt's "Special Account." (Plaintiff's Exhibit 7.) This account was a checking account payable on checks counter-signed by the persons designated in the subordination agreement. (Plaintiff's Exhibit 5.) Payments were made by the bankrupt, from time to time, on the various loans made by appellee to him. Those payments are set forth on the lower half of the first page of plaintiff's Exhibit 7. Four of those payments were made by checks drawn by the bankrupt on his special account. Two were made by setting off the debt of the bankrupt to appellee against the debt of appellee to the bankrupt on his checking account. A single payment was made by applying the proceeds of the State warrant dated January 6, 1949, in the amount of \$3,785.76 directly on bankrupt's indebtedness.

In this action, appellant sought to recover not only the proceeds of the State warrant dated January 6, 1949, in the amount of \$3,785.76, but also the amounts paid to appellee by the bankrupt by his checks and the amounts collected by appellee setting off against the account of the bankrupt. The appellant does not seek to recover under Bankruptcy Act § 60. (11 U.S.C.A. 96; Tr. p. 65.) Section 60 is inapplicable because all payments received by appellee were received more than four months prior to the filing of the Petition in Bankruptcy. (Plaintiff's Exhibit 7, and paragraph II of the amended complaint; Tr. p. 8.) In the court below, appellant did not seek to set aside or avoid the assignment (plaintiff's Exhibit 4), but rather to recover a judgment against appellee.

SUMMARY OF ARGUMENT.

1. Appellee may urge any matter appearing in the record in support of the judgment.

2. With a single exception, payments received by appellee were received from the bankrupt rather than under the assignment for which reason no invalidity of the assignment would affect appellee's right to them.

3. The assignment of a right to receive money under a written contract with the State of California is not an assignment of an "account" within the meaning of California Civil Code § 3017.

4. Even if the assignment to appellee was invalidated, appellant is entitled only to set aside or to avoid

the assignment; he may not recover payments made to appellee prior to the assignor's bankruptcy.

ARGUMENT.

APPELLEE MAY URGE ANY MATTER APPEARING IN THE RECORD IN SUPPORT OF THE JUDGMENT.

The rule is well settled that an appellee may urge any matter appearing in the record in support of the judgment without taking a cross-appeal. In *U. S. v. America Ry. Co.*, 265 U.S. 425 44 Sup. Ct. 560 (1924), it was contended that certain claims of the appellee could not be availed of because they had been overruled by the lower court and no cross-appeal had been taken. At page 435 the Supreme Court said:

“The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered

below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined.”

In *L. McBrine Co. v. Silverman*, 121 F. 2d 181 (C.C.A. 9th 1941) a district court judgment was modified and affirmed. The district court had dismissed actions in patent infringement suits on the ground that the claims involved were invalid and void. The court said at page 182:

“We affirm the dismissals; not, however, on the ground assigned by the trial court, but on the ground that no infringement was shown. That we may affirm on a ground not assigned by the trial court is well settled.”

Again in *Town of South Tucson v. Tucson Gas, Electric Light & Power Co.*, 149 F. 2d 847 (C.C.A. 9th 1945) the district court without filing an opinion, dismissed a condemnation suit. The court states at page 847:

“Appellant assigns several grounds of error in the judgment of the district court. That court filed no opinion. It is contended that the Power Company is urging here certain matters not presented in the court below and hence not within our cognizance. In this the appellant is in error, since we are required to seek the support of the judgment appealed from upon any ground disclosed in the record.”

WITH A SINGLE EXCEPTION, PAYMENTS RECEIVED BY APPELLEE WERE RECEIVED FROM THE BANKRUPT RATHER THAN UNDER THE ASSIGNMENT FOR WHICH REASON NO INVALIDITY OF THE ASSIGNMENT WOULD AFFECT APPELLEE'S RIGHT TO THEM.

The payments received by appellee on October 11, 1948, November 16, 1948, December 13, 1948, and the payment for interest received on December 20, 1948, were made by means of checks drawn by the bankrupt on his special account. (Plaintiff's Exhibit 7.) Payments received by the appellee on March 22, 1949, and April 7, 1949, were made by means of setoff, *i.e.*, appellee setoff the debt of the bankrupt, consisting of the loans made to him, against its debt to him, consisting of his special account. (Plaintiff's Exhibit 7.) The only payment received by appellee from the State of California was the payment of January 6, 1949, in the amount of \$3,785.76, which was applied to the bankrupt's indebtedness. (Plaintiff's Exhibit 7.)

Except for the January 6 payment, appellee did not, in fact, collect or receive money from the State of California as assignee of the bankrupt. Excepting the January 6 payment, all money paid under the contract was deposited in the bankrupt's special account. Excepting the January 6 payment, all payments to appellee came from the bankrupt, *not from the State of California*. With exception of the January 6 payment, it is difficult to see how appellant has any claim against the appellee for these payments based on the alleged invalidity of the assignment. (Plaintiff's Exhibit 4.)

This conclusion is supported by the decision in *M. M. Landy, Inc. v. Nicholas*, 221 F. 2d 923, (C.A. 5th,

1955.) The assignments involved in that case were invalid because they were neither recorded as required by State law, nor made in compliance with the Federal Assignment of Claim Statute, 31 U.S.C.A. § 203. Although the assignments were invalid, the court held that the trustee in bankruptcy of the assignor could not recover non-negotiable warrants issued by the Federal Government to the bankrupt and delivered to the assignee. The court held that the possession of the warrants by the assignee constituted a valid pledge and a perfection of the assignee's security interest. The case was remanded, however, since on the record the court could not determine whether the perfection had occurred more than four months prior to bankruptcy. Excepting the January 6 payment, the payments received by appellee from the bankrupt in this case were at least equivalent to the transfer of non-negotiable warrants in the *M. M. Landy, Inc.* case. Even if it is assumed that the assignment was invalid, or that there was no assignment at all, those payments by the bankrupt standing alone were sufficient to pass good title to the funds to appellee. Appellant concedes no question of preference is involved. (Tr. p. 65.)

Therefore, as to all payments received by appellee, except the January 6 payment, the judgment should be affirmed on the ground that the allegedly invalid assignment is not involved.¹ If the judgment as to those payments is affirmed on that ground, then the

¹The *M. M. Landy Inc.* decision does not extend to the January 6 payment, because the record fails to show that the bankrupt actually received the warrant, constituting the January 6 payment from the State, and then transferred it to appellee.

remainder of this brief is properly directed only to the proceeds of the January 6 payment, in the amount of \$3,785.76. Otherwise, the remainder of this brief is directed to the rights of the parties to the proceeds of all payments.

THE ASSIGNMENT OF MONEY PAYABLE UNDER A WRITTEN CONTRACT IS NOT AN ASSIGNMENT OF AN "ACCOUNT" WITHIN THE MEANING OF CALIFORNIA CIVIL CODE §3017.

(a) The right assigned was not an "account".

The District Court concluded that the assignment (plaintiff's Exhibit 4) of the bankrupt's right to receive money due or to become due under the written contract (plaintiff's Exhibit 1) constituted an assignment of an account, within the meaning of California Civil Code § 3017. (Conclusion No. 1; Tr. p. 47.) Appellant relies on *Menick v. Carson*, 96 F. Supp. 817 (D.C. Cal. 1951.) However, in that case, the question whether the subject of the assignment there involved was an account was not raised. *Menick v. Carson* is inapplicable to the case at bar because the rights assigned to appellee did not constitute an account.

Section 3017(1) of the Civil Code of the State of California as in force on September 15, 1948, provided:

“ ‘Account’ means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance or other instrument for the payment of money; it includes rights under an unperformed

contract for work, goods or services which in the regular course will result in an open book account.”

Appellant cannot prevail unless the rights assigned to appellee constitute an account within the meaning of the language quoted above. Even if the subject of the assignment is an account, appellant still may not succeed if the account was represented by an “instrument for the payment of money.”

A long, consistent line of California cases has established that a written contract can never result in an “account” except by agreement of the parties thereto.

Parker v. Shell Oil Co., 29 Cal. 2d 503, 175 P. 2d 838 (1946);

Tillson v. Peters, 41 Cal. App. 2d 671, 107 P. 2d 434 (1940);

Lee v. DeForest, 22 Cal. App. 2d 351, 71 P. 2d 285 (1937);

Stewart v. Claudius, 19 Cal. App. 2d 349, 65 P. 2d 933 (1937);

Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692 (1914).

The text writers are in accord with the definition of “account” established by the cases cited above.

Section 4 of the article on Accounts and Accounting in Volume 1 of California Jurisprudence 2d, summarizes in part (pp. 316-317):

“The claim comprising an account may or may not be evidenced by a written record; but *it cannot be evidenced by a written obligation or express*

contract and constitute an account in the ordinary sense." (Emphasis added.)

Section 49 of the article on Account in Volume 1 of Corpus Juris Secundum reads in part (pp. 573-575):

"Accounts receivable. The amount owing to a person on open account.

" * * *

"Open Account. An open account is one in which some item of contract is not settled by the parties, or where there have been running or current dealings between the parties and the account is kept open with the expectation of further dealings. In other words, it is an unsettled debt arising from items of work and labor, goods sold and delivered, *and other open transactions not reduced to writing, and subject to future settlement and adjustment.* However, all accounts which are not stated or reduced to writing are not necessarily open accounts; and an account, although not reduced to writing or stated, cannot be said to be open where it is based on a contract whose terms are fixed and certain." (Emphasis added.)

Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692 (1914), contains this definition of "account", at page 253:

"In 1 Ruling Case Law, page 207, it is said: 'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually

disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes.' "

By taking the position that "the sole question before the court is whether the collection of the account by the assignee extinguishes the account" (appellant's Brief, p. 6), appellant avoids discussing most of the points in issue in his opening brief. We assume, however, that it is appellant's position that the rights assigned to appellee were accounts merely because the bankrupt kept books which have been referred to as "books of account". Some of the testimony elicited so indicates. (Tr. pp. 75, 84, 85, 86.) If that position is sustained, the result will be a holding that the bankrupt had the legal power, by his arbitrary act of keeping or not keeping books, to determine the validity of the security held by appellee.

We submit that the bankrupt had no such legal power. The ability of one party to affect the legal rights of another by keeping accounts rests entirely in the consent of the other that the account be kept and that his rights be so affected. The requirement of consent is stated by the California Supreme Court of the State of California, in *Parker v. Shell Oil Company*, 29 Cal. 2d 503, 507, 175 P. 2d 838, (1946):

"A mutual, open, current account must consist of reciprocal demands. It is not enough, to constitute a mutual account, that there exist debts which could be the subject of setoff; there must be an understanding, express or implied from the

nature of the dealings between the parties, that charges on each side are to extinguish *pro tanto* those on the other side, so that there exists but one indivisible liability arising from the series of transactions.”

Nothing in the Record indicates consent on the part of either appellee or the State of California to be bound by records kept by the bankrupt. On the contrary, the Record indicates that even the bankrupt did not consider his entries to be a determination of the amounts due under the contract. The amounts entered in the bankrupt’s “accounts” are not in agreement with the amount paid by the State of California, yet the payments were accepted without objections. (Tr. p. 90.) Since the rights assigned are not within the meaning of “account”, and since there was no understanding that an “account” should be kept, no filing was required.

(b) The money was payable under an “instrument for the payment of money”.

Even if we assume that the assignment of the right to receive money under the contract here involved was an assignment of an “account”, the assignment nevertheless is excluded from the operation of the California statute because the right assigned was represented by an “instrument for the payment of money.”

In *In re Richards*, 108 F. Supp. 259 (S.D. Cal. 1952), the District Court for the Southern District of California held that an assignment of a debt arising under the terms of a written contract is not within

the operation of California Civil Code § 3017 because it is not an assignment of an “account”, and that even if it were, it would be excluded from the purview of the statute as an assignment of a debt represented by an “instrument for the payment of money”.

The *Richards* case is the only one which has directly dealt with this particular point. It involved a petition for review of an order of the referee in bankruptcy determining that certain money due the bankrupt under a “dealer’s agreement” constituted an account within the meaning of §§ 3017, *et seq.*, of the California Civil Code. The bankrupt in that case assigned his rights to payment under certain conditional sales contracts to a bank under a “dealer’s agreement”. Pursuant to the agreement, the bank reserved a balance of 5 per cent as a reserve account against payment of the conditional sales contracts. Thereafter the bankrupt borrowed money from Pantages and by a document designated as a “general pledge agreement” assigned as security to Pantages his interest in the 5 per cent reserve account. Notice of the pledge was given to the bank, but no notice of assignment was filed under California Civil Code § 3017, *et seq.* The Referee’s order held the assignment invalid and directed the bank to pay the trustee.

The District Court reversed the order of the Referee and furnished an unequivocal guide for the application of the California statute to the facts in the instant case (pp. 261-262):

“Clearly the money due to Richards under the dealer’s agreement was money ‘represented’ by

that 'instrument' for the payment of money to Richards. The Bank purchased the contracts and owed Richards the money. And while it is true that the amount might change from time to time, nevertheless the sole right of Richards to recover from the Bank depended upon that contract. If Richards sued the Bank he would have had to sue on the contract as it alone defined the liabilities and rights between them. The fact that such account was called a 'reserve account' was a mere matter of nomenclature and did not bring the transaction within the definition as an 'account'; and the fact that the Bank might have kept books showing the amount due did not do so either. Such entries in books would be a mere memorandum of the *debt which accrued under the terms of the written contract*.

"If the argument of the Trustee is correct it would follow as a logical conclusion that all conditional sales contracts which Richards entered into with his customers and which are so widely used in the sale of hard goods and commodities in the commercial world today, were and are 'accounts' within the definition of Section 3017 and that the assignment and transfer of those contracts by Richards to the Bank would be void unless notice were given as required by Section 3017 of the California Civil Code. It is inconceivable that the legislature intended to impose such a burden upon the commercial world.

"The statute plainly does not and was not intended to cover a situation where the obligation is evidenced or 'represented', as the statute says, by 'an instrument in writing' such as exists in the instant case."

In the *Richards* case the parties at times designated the right to payment assigned as an "account". Notwithstanding this designation, the court held the right assigned was not an "account" within the meaning of the California statute because it was represented by a written agreement. In the case at bar the right assigned has not been designated an "account" by the parties.

(c) The right assigned could only arise under a written contract.

An even stronger argument can be made in this case because of the nature of the contract involved. Plaintiff's Exhibit 1 is subject to c. 3, part 5, div. 3, tit. 2 of the California Government Code. California Government Code § 14254 reads as follows:

"As used in this chapter, 'project' includes the erection, construction, alteration, repair or improvement of any state structure, building, road, or other state improvement of any kind which will exceed in cost a total of two thousand dollars (\$2,000)."

Since the contract (plaintiff's Exhibit 1) is within the definition of "project", the right to receive money from the State of California arose, *and could have arisen only*, under and pursuant to a written instrument and the provisions of the California Government Code cited above. The California Government Code, § 14272, provides:

"Work on all projects shall be done under contract awarded to the lowest responsible bidder pursuant to this chapter, except that it may be

done by day's labor under the direction of the department:

“ * * * (Exceptions not applicable here.)”

The duty of the State to pay and the right of a contractor to receive payment is controlled by California Government Code § 14402, which reads as follows:

“Payments upon contracts shall be made as the department prescribes upon estimates made and approved by the department, but progress payments shall not be made in excess of 90 percent of the percentage of actual work completed, plus a like percentage of the value of material delivered on the ground or stored subject to or under the control of the State, and unused. The department shall withhold not less than 10 percent of the contract price until final completion and acceptance of the project. The Controller shall draw his warrants upon estimates so made and approved by the department and the Treasurer shall pay them.”

Since the right to receive payments from the State of California arose under a contract in writing and pursuant to the provisions of the California Government Code, *and since the obligation could arise in no other way*, no right of the bankrupt to payment under the contract could exist by virtue of any account kept by him. His right to payment could only exist by virtue of the written contract (plaintiff's Exhibit 1), the California Government Code, and the estimates *made by the department* pursuant thereto. That the bankrupt made entries in his books which were charac-

terized by appellant's witness, Mr. Mendelson, as accounts, (Tr. pp. 85, 86, 87) can in no way affect the applicability of California Civil Code § 3017. As stated in *In re Richards*, 108 F. Supp. 259 (S.D. Cal. 1952), at page 261, such entries "would be a mere memorandum of the debt which accrued under the terms of the written contract". The payments upon such contract are "made as the department prescribes upon estimates made and approved by the department," not upon entries made by a contractor in his books. The bankrupt apparently accepted payment of a lesser amount than his books indicated was due him without objection.

(d) Subsequent legislation shows filing of notice was never required.

It seems that the legislature never intended that contracts relating to public works, or the assignment thereof, should be subject to the provisions of California Civil Code §§ 3017, *et seq.* In 1953, the legislature recast § 3017 so as to clarify the definition of "account". Subsection 1 of § 3017 was changed from a single paragraph simply setting forth what the term "account" included to a paragraph setting forth what type of obligations were included, together with three subsections expressly stating that certain types of obligations were not included within the meaning of that term. It is well settled that when a statute is recast to clarify its meaning without changing the substance of its provisions, the legislative intent of the old statute will be determined as that intent is clarified in the new statute. For example, in *Commissioner v. Estate*

of *Holmes*, 326 U.S. 480, 66 Sup. Ct. 257 (1945), rehearing denied 327 U.S. 813, 66 Sup. Ct. 519, the court was faced with the effect of the recasting of § 302(d) of the Revenue Act of 1926. That section was rewritten in two separate paragraphs, each relating to revocable transfers. The phrase "to alter, amend or revoke" in § 302(d) was changed to read in the new § 811(d)(1), "to alter, amend, revoke or terminate". The words "or terminate" were not added to the phrase as used in § 811(d)(2). The question presented was whether the addition of the words "or terminate" constituted a change of substance or merely a clarification of the old section. In holding that the additional words merely clarified the meaning of the old statute, and that the phrase "to alter, amend or revoke" as used in the old statute meant "alter, amend, revoke or terminate," the court said, at page 487:

"The 1936 revision resulted from the *White* decision, which raised doubt whether Congress had included the power to terminate in the words 'alter, amend, or revoke.' To clarify the matter Congress removed all doubt for the future by enacting § 811(d)(1). At the same time it adopted § 811(d)(2), which retained the earlier phrasing. This was from concern that retroactive application of § 811(d)(1) should not impose taxes on prior transfers not comprehended by the prior law, as the concluding sentence of § 811(d)(2) shows. Notwithstanding this and the doubt created by *White v. Poor*, supra, the report of the Committee on Ways and Means of the House of Representatives expressly states that the addition of 'or terminate' in § 811(d)(1) was 'declaratory

of existing law'. Administrative interpretation, including Treasury Regulations, support this view, which also is either followed or indicated in decisions of the Circuit Courts of Appeals, except the one now in review. As we have pointed out, that view is more consonant with the structure and interpretation given concomitant taxing act provisions. For all these reasons, we think it must prevail."

The recent case of *United States v. Parkinson*, U.S.D.C. S.D. Cal. (Carter, J.), decided October 21, 1955, 24 U.S. Law Week 2191-2192, also supports the proposition that legislative intent and the meaning of a statute may be derived from an amendment which merely recasts or clarifies the statute. The question was whether the District Court had discretionary power ancillary to its jurisdiction to grant injunctive relief under § 302(a) of the Federal Food, Drug and Cosmetic Act to compel the defendants in that case to refund to purchasers the money paid for drugs.

The Fair Labor Standards Act and the Federal Food, Drug and Cosmetic Act were enacted on the same day and contained almost identical provisions for equitable relief. Several appellate courts had held that restitution of back pay could properly be ordered as an adjunct to an injunction under § 17 of the Fair Labor Standards Act. The Supreme Court had never ruled on this question. Congress being concerned with the interpretation of § 17 amended that section to provide in express terms that restitution was not authorized thereunder, and enacted other statutory provi-

sions relating to restitution. The opinion, with reference to the effect of the amendment of the Fair Labor Standards Act as showing the legislative intent and meaning of the similar provisions in the Federal Food, Drug and Cosmetic Act (24 U.S. Law Week 2192), said:

“This blunt repudiation by Congress of the asserted powers of a district court to order restitution under Fair Labor Standards Act, with its almost identical provision to that of Section 302 (a) of the Food and Drug Act (Sec. 332(a) U.S.C.A. Title 21), is significant and convincing insofar as this court is concerned.”

The recasting of Section 3017 and the addition of § 3017(c) does no more than clarify the meaning of the former section by providing in express terms that contracts for public construction of the type assigned by plaintiff's Exhibit 1 are not accounts as that term is used in California Civil Code §§ 3017, *et seq.*

EVEN IF THE ASSIGNMENT IS INVALID, PLAINTIFF MAY DO NO MORE THAN DISREGARD IT AND COLLECT FROM THE BANKRUPT'S DEBTOR SUCH SUMS AS REMAIN DUE THE BANKRUPT UNDER THE CONTRACT.

(a) **Menick v. Carson** does not control this case.

While denying that such is the case, we assume, *arguendo*, that the assignment (plaintiff's Exhibit 4) was of an “account” within the meaning of California Civil Code § 3017. Since appellee did not comply with § 3019, the question arises whether present or future creditors are restricted to disregarding the

assignment (as distinguished from recovering money collected by appellee) and collecting from the assignor's debtor such sums as may remain unpaid. In other words, may they, in addition to disregarding the assignment, proceed against the appellee and recover from appellee the money it has collected?

Appellant relies entirely on *Menick v. Carson*, 96 F. Supp. 817. (S.D. Cal. 1951.) Initially it should be pointed out that that case dealt with open book accounts, and the question whether the accounts assigned were accounts within the meaning of California Civil Code § 3017 was not raised. The court holds as follows, at page 820:

“In paragraph VIII of the complaint the plaintiff alleges the existence of two groups of creditors. He alleges that there are persons who advanced credit to the bankrupt in the period between June 20, 1948, and February 14, 1949, none of whom had any actual or constructive notice of the assignments of the accounts by the bankrupt to the defendant. But plaintiff fails to allege that these persons extended credit prior to the collection of the accounts by the assignee. This is a fatal omission. Plaintiff also alleges that there are persons who advanced credit to the bankrupt prior to the assignments in question and that the bankrupt remained indebted to these persons at the time of bankruptcy. But plaintiff fails to allege that these persons were ‘without notice of such assignment(s)’ as is required by Section 3019. *Thus the plaintiff has failed to state a claim against the defendant upon which relief may be granted.* Therefore the motion to dismiss

should be granted but with leave to amend.”
(Emphasis added.)

It is submitted that the italicized sentence of the above quotation constitutes the holding of the case. Since the holding is that the plaintiff failed to state a claim upon which relief could be granted, the discussion of the court, with respect to what is an account within the meaning of § 3019, and its statements, with respect to the right of a trustee in bankruptcy to recover proceeds paid to an assignee under an assignment invalid for non-compliance with California Civil Code § 3019, are *dicta*. Because the views expressed by the court with respect to the right of a trustee in bankruptcy to recover the proceeds of an assignment from the assignee are directly contrary to the position taken by Appellee, it is necessary to take issue with them. With reference to California Civil Code §§ 3017, *et seq.*, the court states that the purpose “is to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtor’s financial position.” It is submitted that the court’s construction of those sections and its entire discussion of their effect and applicability are based on this statement of purpose. It is submitted further that the court was in error.

Prior to the enactment in 1938 of the Chandler Act, 52 Stat. 840, the various states followed one of three common law rules which determined when an assignment of accounts became effective as against subsequent bona fide purchasers. Briefly stated those three

rules are: (1) The English rule or notification rule under which the assignee who first gave notice of his assignment to the debtor on the account assigned perfected his assignment; (2) The New York rule which gave effect to the assignment first in time without regard to notice; and (3) The Massachusetts rule adopted by the *Restatement of Contracts*.² Prior to 1938, the general rule was that an assignment of accounts otherwise valid did not amount to a preference, even though no notice was given to the obligors on the accounts assigned. In *Corn Exchange National Bank and Trust Co. v. Klauder*, 318 U.S. 434, 63 Sup. Ct. 679 (1933), it was held that under the Chandler Act an assignment in the so-called notification states was not perfected until notice of the assignment was given to the obligors on the account assigned. Although present value was given for the assignment, such consideration would be antecedent to the delayed effective date of the transfer, and the assignment would be subject to avoidance as a preference under Section 60(a) of the Bankruptcy Act. Section 60(a) was thereafter amended in 1950 to avoid this difficulty. With reference to the *Klauder* case and cases following it, 3 *Collier on Bankruptcy* states, at page 966:

“Even before this amendment was made, however, *these cases produced another result in the field of state legislation*. Numerous states enacted ‘validation acts’, adopting the New York common law rule (Rule 2 above), and validating an assignment of accounts as against subsequent *bona fide* purchasers of the same accounts regardless of

²3 *Collier on Bankruptcy* (14th ed., 1941), §60.48, page 964.

notice to the account debtors. Other states enacted statutes under which recording or filing is required for validity as against either purchasers or creditors. A few adopted book-marking statutes, under which an assignment may be perfected by making a notation of it upon the assignor's account books." (Emphasis added.)

California and Florida were among the states which enacted statutes requiring recording or filing. The view that the purpose of such statutes is not to prevent secret liens or transfer, but rather to afford assignees a means of perfecting assignments of accounts so as to avoid the rigors of § 60(a) as enacted by the 1938 Bankruptcy Act is further supported by *M. M. Landy, Inc. v. Nicholas*, 221 F. 2d 923 (C.A. 5th Cir. 1955), in which the court stated, with reference to the Florida statute, in footnote 4 at page 928:

"We may judicially note that this statute, like those in 35 other states, *was adopted as a direct result of the Chandler Act amendment* to § 60, sub. a of the Bankruptcy Act, 11 U.S.C.A. § 96, sub. a, and its application in *Corn Exchange Nat. Bank & Trust v. Klauder*, 318 U.S. 434 * * * *." (Emphasis added.)

The case of *Durkin v. Durkin*, 133 Cal. App. 2d 283, 284 P. 2d 185 (1955), adjudicated the priorities of several creditors to an insolvent's "Dealer's Reserve Account" which had been created and was governed by a written contract. The insolvent had assigned his rights in it to one of the creditors. On the principle question, whether it was an "account" within the meaning of California Civil Code § 3017, the court

held in the negative. The court found additional support for its conclusion in the "history of legislative enactments and judicial decisions affecting nonnotification financing of accounts receivable." The court observed that the decision in the *Klauder* case "gave impetus to the urge for state legislation designed to foster nonnotification financing of accounts receivable in a manner that would obviate the results of the decision." The court states at page 292:

"There is no doubt that chapter 766 of the California Statutes of 1943, page 2542, adding sections 3017-3029 to the code (described in its title as 'An act . . . relating to the assignment of accounts receivable and providing for the giving of notice thereof'), was designed to facilitate nonnotification financing of accounts receivable by substituting the filing requirements of section 3019 for the former requirement that each customer-debtor be notified of the assignment. (See 38 Cal. L. Rev. 308-309; 17 So. Cal. L. Rev. 303, 306.) In our case the dealer and the bank had no need for such a remedy. Here the 'accounts receivable,' being in the form of conditional sales contracts, were readily transferable without notice to the customer-debtor. There was no occasion to impose filing requirements to facilitate nonnotification financing of such accounts. Similarly, there was no occasion, in furtherance of such financing, to impose filing requirements upon the manufacturer, merchant or dealer whenever he chose to convey an interest in credits accruing to him from the bank that financed these accounts for him, because there was no conceivable reason, in fact or in fancy, for not notifying the debtor-bank as was immediately done in the instant case."

It is hardly necessary to point out that in the case at bar there is no reason for imposing filing requirements respecting the assignment involved because there is no conceivable reason for not notifying the State of California. As the assignment (plaintiff's Exhibit 4) shows, such notice was promptly given. (See Disbursing Officer's stamp.)

In view of the development of California Civil Code §§ 3017, *et seq.*, the conclusion seems inescapable that the purpose of this enactment was not to protect creditors, but on the contrary to protect assignees. Because of the effect of Bankruptcy Act § 60(a), it was deemed advisable by the legislature to set up some scheme whereby assignments of accounts which were perfected could be distinguished from those which were not perfected. The device adopted in California was that of requiring the assignee and assignor to file a notice with a public officer. The legislature did not make assignments for which no notice had been filed invalid for the purpose of protecting existing and future creditors, but rather made that class of assignments invalid as a *necessary complement* to the class of valid or perfected assignments, *i.e.*, those assignments for which notice was filed. In declaring that a certain class of assignments is invalid as to certain persons and that another class of assignments is valid, the legislature did not disclose an intention to protect those persons who might take advantage of the invalidity of invalid assignments.

Although present and future creditors, as well as subsequent assignees, may take advantage of invalid

assignments this fact does not evince any legislative purpose other than to provide a means of perfecting assignments of accounts. The legislature could not have entertained a purpose to give protection to assignees of accounts receivable and at the same time, have entertained an inconsistent purpose of increasing the hazards of taking such assignments. In determining the purpose for which a statute is enacted, as an aid in construing the statute, reference should be made of the problem it is designed to solve, not the technique or device selected to accomplish that purpose. When reference is made to the purpose of the enactment of a statute, as an aid to resolve ambiguity of the statute, it is illogical to derive that purpose from the very same statute.

With the true purpose for the enactment of this statute in mind, it is clear that the statute was not designed to prevent secret liens and transfer, and that allowing an assignee to keep money collected under an invalid assignment does not “practically make the statute a nullity.”³ On the contrary, allowing the assignee to keep such money as he collects, aids and promotes the purpose of the statute by allowing to him at least part of the security he enjoyed before the enactment of the Chandler Act.

The court’s misconception of the purpose of California Civil Code §§ 3017, *et seq.*, led it to regard assignments declared *invalid* under § 3019 analogous to chattel mortgages *void* under California Civil Code § 2957 and transfer *fraudulent and void* under Cali-

³*Menick v. Carson*, at p. 819.

ifornia Civil Code § 3440. This misconception of purpose also led the court to assert at page 820:

“Since Section 3019 deals with the same general subject and has the same purpose, it should be construed *in pari materia* with Sections 2957 and 3440.”

In *Smith v. Harris*, 127 Cal. App. 2d 311, 273 P. 2d 835 (1954), the court was faced with the question whether recordation of assignments was required when the assignee and assignor resided outside California. In holding no recordation was required, the court observed that the parties agreed §§ 3017-3029 should be read *in pari materia* with §§ 2957 and 3440. (citing *Menick v. Carson*.) The court replied at page 315:

“But by clear construction those sections [2957 and 3440] are concerned only with tangible personal property, not with choses in action, *which because of their intangible nature, are distinguishable*. It has been pointed out in cases that the possession of personal property by the vendor gives him visible credit in the eyes of the world, *a characteristic that does not apply to debts*.” (Emphasis added.)

In addition to the difference in subject and purpose between California Civil Code §§ 3017, *et seq.*, and §§ 2957 and 3440, the difference in terminology must be considered. Chattel mortgages which are within § 2957 are *void* against the protected persons. Transfers which are within § 3440 are *fraudulent and void*, but assignments of “accounts” are merely *invalid*, if there is no compliance with § 3019. Thus, the views

expressed in *Menick v. Carson* are not applicable in this case.

(b) Collection cured any defect that might have existed respecting the assignment to appellee.

The invalidity of an assignment, as to certain persons, cannot affect title to money collected under it. The invalidity permits the favored persons to set aside or avoid the assignment and prevents the debtor from discharging his debt by thereafter paying to the assignee. But the avoidance cannot have retroactive effect. The debtor's act of paying *his* money to the assignee surely gives the assignee good title to it. Payment from the debtor to the assignee under an invalid assignment before avoidance is probably effective to discharge the debtor's obligation. But whether payment is made before or after avoidance, *it is the money of the debtor that is paid*, not that of the assignor. Thus, the invalidity of an assignment merely means that the debtor may not pay to the assignor with liberating effect (*i.e.*, be discharged of his obligation), after the assignment is avoided. It does not mean that persons entitled to assert the invalidity have a right to recover the *debtor's money* from the assignee.

Two cases in the Second Circuit hold that the assignee obtains good title, as against the assignor's creditors, to money collected under invalid assignments. The assignments in these cases were invalid under the rule of *Benedict v. Ratner*, 268 U.S. 353, 45 Sup. Ct. 566 (1925). It is submitted, however, that the reason for holding the assignment invalid is im-

material in so far as the assignee's rights to retain money collected prior to bankruptcy are concerned.

In *Lee v. State Bank and Trust Co.*, 38 F. 2d 45 (C.C.A. 2d 1930), where the case was remanded for further proceedings to determine whether the assignment was fraudulent in that the assignor reserved dominion, the court said, at page 48:

“While no lien would arise merely by virtue of assignments, dominion over which was agreed to be retained by the assignor, nevertheless, if the loans made by the bank were not given with intent to hinder or delay creditors, the transaction was not void; as to moneys actually collected on the accounts prior to the date of the bankruptcy, the bank would be in the same position as any creditor to whom payments had been made at the times of collection; that is, the payments would be recoverable only if the elements of unlawful preference were established. But, as heretofore stated, the evidence fails to sustain plaintiff in this respect. It follows, therefore, that moneys collected before bankruptcy may be retained; moneys collected by defendant thereafter, through payment of these accounts, are subject to the further determination of the court on the entire case.”

Walradt v. Miller, et al., 45 F. 2d 686 (C.C.A. 2d 1930), involved an assignment of accounts, which assignment was invalid because of dominion reserved by the assignor. As to the trustee's rights where the assignee had collected part of the accounts, the court states, at page 687:

“From the fact that Cohen not only kept the accounts, but was to, under his arrangement with Miller, and did, reserve and exercise complete dominion over them, there arises a conclusive presumption that the first assignment was fraudulent as to creditors. *Benedict v. Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991. The trustee is now entitled to have assigned to him any uncollected accounts covered by the assignment of December 11, which were outstanding and unpaid when the petition in bankruptcy was filed January 11, 1927, and to have any money collected by Miller after January 11, 1927, on the accounts assigned in December also turned over. But it is not enough that the assignment was invalid to entitle him to recover any money received by Miller before bankruptcy either from Cohen or directly from the collections made by Miller himself on the accounts assigned. At the worst, such payments to Miller were only preferential.”

The last two cases cited bar a trustee in bankruptcy from recovering money collected prior to bankruptcy by an assignee of accounts receivable under an invalid assignment. Appellant, however, may take a contrary position. He may point out that a mortgagee under a *void* chattel mortgage cannot cure the defect by taking possession of the mortgaged chattels (*Loosemore v. Baker*, 175 Cal. 420, 166 Pac. 26 (1917)), also, that a purchaser at a sale *void* under California Civil Code § 3440 cannot cure the defect in his title by subsequently obtaining possession of the property. (*Della v. Home Bank of Porterville*, 105 Cal. App. 106, 286 Pac. 1064 (1930).) Based on these

propositions he may assert that an assignee of money under an invalid assignment cannot perfect his title by collecting it.

As is pointed out below, no analogy is to be drawn between the position of an assignee under an invalid assignment and the position of a mortgagee under a void chattel mortgage or the position of a purchaser under a void bill of sale. The *purpose* of the assignment statutes differs from the purposes and terms of the chattel mortgage and fraudulent sales statutes. In *Smith v. Harris*, 127 Cal. App. 2d 311, 273 P. 2d 835 (1954), where the parties had mistakenly agreed that California Civil Code §§ 3017-3029 should be read *in pari materia* with California Civil Code §§ 2957 and 3440 the court said, at page 315:

“But by clear construction those sections [2957 and 3440] are concerned only with tangible personal property, not with choses in action, *which because of their intangible nature, are distinguishable*. It has been pointed out in cases that the possession of personal property by the vendor gives him *visible credit* in the eyes of the world, a characteristic that does not apply to debts.” (Emphasis added.)

Furthermore, it should be observed that even in the case of a void chattel mortgage, if the mortgagee obtains possession of the chattels by a voluntary transfer from the mortgagor as *payment*, rather than under his void chattel mortgage, such transfer gives the mortgagee good title. In *Stephens v. Perrine*, 143 N.Y. 476, 39 N.E. 11 (1894), the court held that a chattel mort-

gage was void because the mortgagee neither took possession of the property nor recorded the mortgage. The court also held the mortgagee could acquire no rights by taking possession of the property "under the mortgage" and selling it. The same rule is declared for California in the *Loosemore* case, *supra*. The court stated, however (39 N.E. 12):

"If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been, in such a case, a transfer of property by them in payment of their debt, and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make. But in this case there was nothing of the kind done. The mortgagee acted under and by virtue of her mortgage all the time. The mortgagors did not deliver the property to her in payment of her debt."

In *Bowdish v. Page*, 153 N.Y. 104, 47 N.E. 44 (1897), Isaac Allison had executed a void chattel mortgage to M. & F. Allison. M. & F. Allison assigned to plaintiff for the benefit of creditors. Plaintiff made demand on Isaac Allison who then transferred the property to plaintiff. Plaintiff continued in possession until dispossessed by the levy of an execution by defendant issued upon a judgment recovered against Isaac Allison. The court held plaintiff's title rested on the transfer to him by Isaac Allison, not on the void chattel mortgage and assignment. At the time of that transfer defendant had acquired no lien on the

property. Therefore, plaintiff's right to the property was superior. The court states (47 N.E. 46) :

"That case and *Karst v. Gane*, 136 N.Y. 316, 32 N.E. 1073, *Tremaine v. Mortimer*, 128 N.Y. 1, 27 N.E. 1060, and *Mandeville v. Avery*, 124 N.Y. 376, 26 N.E. 951, held this doctrine: That, while the mortgagee cannot enforce a void chattel mortgage against the creditors of the mortgagor, yet if the mortgagor treats it as void, and, before the creditors obtain a lien, transfer the property to the mortgagee in payment of a debt, the transaction will hold. We therefore hold that, within our decisions, the plaintiff occupied the vantage ground of a right to the possession of these goods, derived directly through Isaac's delivery to him, and any question of a title made defective through the void chattel mortgage was removed."

It is not disputed that all money in question, except the January 6 payment, was received by the appellee in voluntary payment of the debts to which it was applied.

A sale and a chattel mortgage are similar in that either constitutes a transfer of tangible property from the mortgagor or vendor; it is the property of the mortgagor or vendor that is transferred, and only two parties are involved. An assignment differs in that only an intangible right of the assignor to collect money from his debtor is transferred, rather than tangible property of the assignor; it is the debtor's money that the assignee may collect, not that of the assignor, and an assignment always involves three parties, *i.e.*, the debtor, the assignor and the assignee.

Possession of tangible property gives the possessor an apparent wealth and invites others to lend money or credit to him on that basis; intangible personal property does not.⁴ The ostensible ownership of tangible property gives rise to the policy of the law to protect innocent persons against being deceived by it. The policy is well stated in *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911 (1899), at 297, where the court quoted from 2 Kent's Commentaries, 523 as follows:

“ ‘The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the *visible* owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession. * * * It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.’ ” (Emphasis added.)

But this reasoning has little application where intangible property is involved, for intangible property creates no apparent wealth. No one should be deceived by what he cannot see. If it should be asserted that accounts receivable create an apparent wealth since prospective creditors may be led to believe that they exist by an inspection of an assignor's books, the answer is that the same impression can be created by

⁴See quotation from *Smith v. Harris*, 127 Cal. App. 2d 311, at page 315, 273 P. 2d 835 (1954), *supra* at page 33.

entirely fictitious accounts. Where business considerations make notification undesirable, verification with account debtors is undesirable for the same reason. On the other hand, where tangibles are involved apparent property cannot be created, and creditors can verify a debtor's claim to possession of such property. Prospective creditors can be deceived by a debtor only if secret liens are allowed to attach to the property.

There is a further distinction to be drawn between sales and chattel mortgages of tangible personal property and the assignment of intangible rights to receive money. Suppose a creditor of a mortgagor attacks the mortgage as being void, and the mortgage is held to be void. The creditor may then reach that property as property of the mortgagor, not because the mortgage is void, but because the property was never effectively transferred from the mortgagor. The property is subject to the claims of the mortgagor's creditors just as any other property owned by the mortgagor and for the same reason. The same is true where a fraudulent and void sale is involved. No title passes. The property remains that of the seller and is subject to the claims of the seller's creditors. When a mortgage or sale is void, the property which creditors may reach is that of the mortgagor or vendor, not that of a third person.

Suppose an assignment of the right to receive money is attacked by creditors of the assignor and is held invalid. The situation is entirely different. If the money assigned has not been collected, then the fact that the assignment is invalid deprives the assignee

of any right to collect it. The assignment being invalid, the assignor is entitled to collect such amounts as have not already been collected and the creditors of the assignor are entitled to have such money applied to their claims. The assignor (or his creditors) may collect from the debtor because the obligation is not discharged until the debtor pays. On the other hand, if the money has been collected by the assignee under an invalid assignment, it cannot be said that title to the money collected from the assignor's debtor has not passed to the assignee. Surely the debtor may pass title to his own money when he pays it to the assignee. What basis can there be for the assignor to recover the debtor's money from the assignee if the assignment is avoided after collection? Do the assignor's creditors have greater rights?

(c) Even if the assignment was void, appellant may not recover California's money.

Appellant may assert that the assignment involved herein is not merely invalid but is void; *i.e.*, the term "invalid" as used in California Civil Code § 3019 should be construed to mean "void". Although such construction is unjustified, we assume, *arguendo*, that the statute should be so construed and that the assignment (plaintiff's Exhibit 4) is void, not merely voidable. As the cases discussed or cited below show, the appellant may not recover money received by appellee under the assignment because it never was and is not now, the bankrupt's property. Appellant may recover only property of the bankrupt under § 70(e) of the Bankruptcy Act.

Where a debtor pays money under a void contract, such debtor remains the equitable owner of it and may recover it back. For example, in *Rued v. Cooper*, 109 Cal. 682, 34 Pac. 98 (1893), it was held that the assignee of an insolvent who had paid money under a contract for the sale of shares of capital stock on margin (for which reason the contract was void) could recover the money. The court states, at page 692:

“There is no distinction between money paid under a contract declared void by the constitution and that paid under any other void contract. In all such cases the party who has paid the money remains the equitable owner of it, though he could not, in many cases, maintain an action for its recovery.”

The debtor who pays under a void contract is the absolute owner of the money before payment and continues to be the equitable owner after payment. The person receiving the payment becomes the legal owner subject to the equity. Thus, where a debtor pays under a void assignment, the assignee becomes the legal owner and the debtor remains the equitable owner. Neither the assignor nor his creditors have any claim to the money. The debtor remains indebted to the assignor. The following cases, in effect, so hold:

In *Barteck v. Personal Finance Co. of Toledo*, 20 N.E. 2d 259, 60 Ohio App. 197 (1938), it was held that payment under a void assignment was no defense to a suit by the employee. The court stated, at page 260, that wage assignments when legally executed bar

an action by the employee to recover from the employer the wages withheld under the assignment, "but a false wage assignment would be in the same class as a forged one—it would be of no validity whatever and would not bar an action by the employee against an employer for wages due and withheld under such false assignment. They could be recovered, with interest." Likewise, it was held in *Atlanta Finance Co. v. Southern Railway Co.*, 84 S.E. 147, 15 Ga. App. 663 (1915), that payment of a debt for wages under a purported assignment will not discharge the debtor from liability to the alleged assignor if the payment is made with full knowledge of the fact that the assignment is void. Therefore, if the assignment here involved is void, appellant's claim is not against this appellee but rather is against the bankrupt's debtor—the State of California.

Metropolitan Life Insurance Co. v. S. F. Bank, 58 Cal. App. 2d 528, 136 P. 2d 853 (1943), seems in point on these propositions. In that case, Metropolitan, a depositor in the Bank of California, brought an action against Bank of California and San Francisco Bank. The amended complaint contained 31 counts. The demurrer of Bank of California was sustained as to the first 15 counts without leave to amend, on the ground that the statute of limitations had run as to those claims. It was overruled as to the remaining counts. The demurrer of San Francisco Bank was sustained as to all counts without leave to amend. The appeal was taken solely from the judgment of dismissal in favor of the San Francisco Bank.

Metropolitan had been induced through the fraud of its employee, Miguel, to draw and issue a series of checks to fictitious persons, which fact was not known to Metropolitan. Miguel secured possession of the checks and endorsed and presented them to San Francisco Bank, which paid Miguel. San Francisco Bank stamped its endorsement on each of the checks, and presented them to Bank of California for collection. The court observed, at page 534, that the checks were not payable to anyone, and that they were *not negotiable instruments*.

It was held that Metropolitan had no cause of action against San Francisco Bank based on the latter's endorsement, since the endorsement ran to the drawee and subsequent holders. It was held that Metropolitan had no cause of action against San Francisco Bank either for converting the checks to its own use or for converting Metropolitan's money to its own use. The court states, at page 534:

“As to the suggested conversion of ‘plaintiff’s money,’ the allegations of the amended complaint showed that the relationship between The Bank of California and plaintiff was the ordinary relationship of a bank to its depositor. Said relationship was that of debtor and creditor and the title to the money deposited by plaintiff in The Bank of California passed immediately to said bank. (*Arnold v. San Ramon Valley Bank*, 184 Cal. 632 [194 P. 1012, 13 A.L.R. 320]; *Glassell Dev. Co. v. Citizens’ National Bank*, 191 Cal. 375 [216 P. 1012, 28 A.L.R. 1427]; *Union Tool Co. v. Farmers etc. Nat. Bank*, 192 Cal. 40 [218 P. 424, 28

A.L.R. 1417].) Plaintiff, after depositing its money with The Bank of California, was no longer the owner or entitled to the possession of any specific money which was the subject of conversion and when The Bank of California paid the amount appearing on the face of the checks to The San Francisco Bank, it paid out of its own money and not that of plaintiff. (9 C.J.S. 735) The suggested theory that The San Francisco Bank converted 'plaintiff's money' violates 'the elemental principle that a depositor has no claim to any specific assets in his bank * * *' (36 Har. L. Rev. 879).''

The last cited case deals with a drawer-creditor, a drawee-debtor and an assignee-collecting bank. The situation of San Francisco Bank is that of an assignee collecting a debt under a void assignment. The assignee-collecting bank collected certain sums of money from the drawee-debtor, upon a void non-negotiable instrument. The court clearly held that the drawer-creditor had no cause of action against the assignee-collecting bank on any theory, even though (1) his cause of action against the drawee-debtor had become barred by the statute of limitations, and (2) the drawee-debtor had a cause of action, or might have had a cause of action, against the assignee-collecting bank.

Applying these principles to the case at bar and assuming that the State of California paid the money in question to appellee under a void assignment, it seems that appellant has misdirected his suit. The right of the trustee under § 70(e) of the Bankruptcy

Act is to collect *the bankrupt's property*, and the right of the creditors is to have the *property of the bankrupt* applied to their claims. Yet appellant seeks to obtain reversal of a judgment which denies recovery of money paid by the State of California to appellee. That money belonged to the State of California prior to payment and the bankrupt at no time had any claim to it. Even if the assignment is void, as was the check in the *Metropolitan* case, it seems that at most the State of California made a mistake in paying its money, not that of a bankrupt, to appellee. While it may or may not be that the State of California could recover these payments from appellee, and while it may be that the State of California remains liable to the bankrupt for having paid under a void assignment, it seems clear that neither the bankrupt, nor his creditors, nor the appellant who stands in their shoes, has any cause of action against appellee.

For the above reasons, we respectfully submit that this court should affirm the judgment of the District Court.

Dated, San Francisco, California,
March 7, 1957.

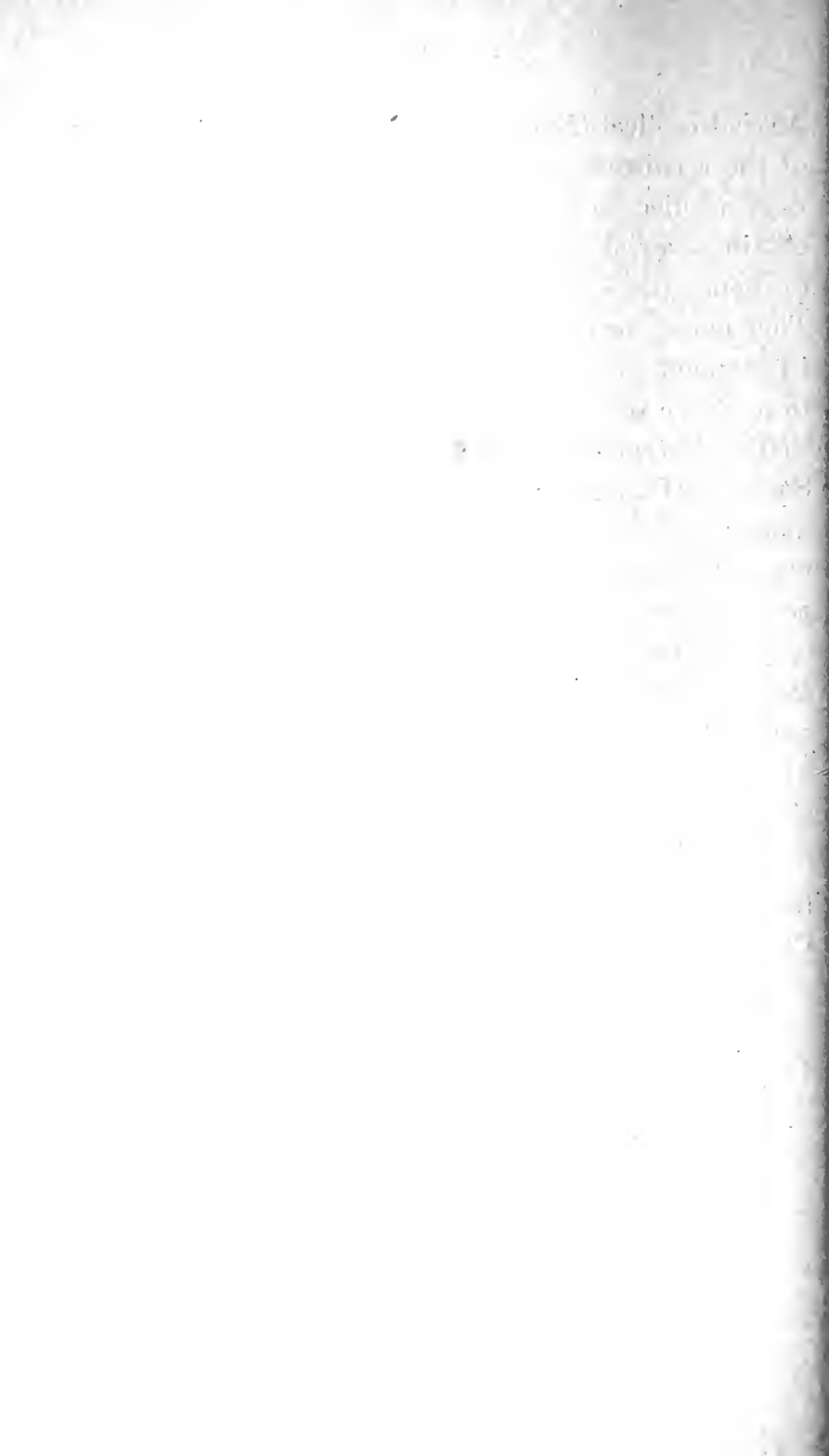
Respectfully submitted,

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No. 15,321

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, as Trustee of the Estate of William Jason Evans, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association,

Appellee.

APPELLANT'S CLOSING BRIEF.

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FILE

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PAUL P. O'BRIEN



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BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association,

Appellee.

APPELLANT'S CLOSING BRIEF.

Appellant has no quarrel with the Statement of Facts contained on pages 2, 3 and 4 of Appellee's Brief so far as it goes, but will supplement it in the arguments on points hereinafter referred to.

Included in the Statement of Facts on page 4 is the statement that Appellant did not seek to set aside or to avoid the assignment but rather to recover a judgment against Appellee. Appellant alleged the necessary facts in his amended complaint (Tr., p. 8) to warrant the court in finding that the assignment of

the moneys to become due under the contract with the State of California was invalid under the Civil Code Sections 3017 et seq. The prayer of the complaint for the recovery of moneys paid to Appellee pursuant to that assignment by the State of California is sufficient without specifically therein seeking to set aside or void the assignment.

The trustee's power to attack the assignment comes from Section 70e(2) of the Bankruptcy Act (11 USCA 110e(2)).¹ Pursuant to the provisions of which Section, the trustee may recover either the property or its value depending upon the circumstances of the particular case. See *Schainman v. Dean*, 24 Fed. 2d 475, in which case this court held that under Section 70e the trustee could avoid such transfers of the bankrupt's property as any creditor might have avoided and to recover the property so transferred or its value in the trustee's option, and the court permitted the trustee to recover the value of the goods transferred because of the failure to comply with California Civil Code Section 3440. This court went on

¹"All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. *The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable Federal or State laws.*" (Emphasis added.)

to hold that the fact that the money derived from the invalid sale was paid to certain creditors of the bankrupt was no defense to the action.

Virtually, the entire argument in Appellee's brief was presented to Judge Goodman and was disposed of by his opinion and order for judgment (Tr., pp. 27-42). However, we will answer the argument here, making appropriate references to the transcript.

ARGUMENT.

I. THIS COURT IS BOUND BY THE FINDINGS OF FACT MADE BY THE DISTRICT COURT.

Although it may be well settled that Appellee may urge any matter appearing in the record in support of the judgment without taking a cross-appeal, this court must accept the District Court's findings of fact unless they are clearly erroneous.

1. *First National Bank of Portland v. Dudley*, (9 Cir.) 231 Fed. 2d 396;
2. *Lines v. Falstaff Brewing Co., et al.*, (9 Cir.) 233 Fed. 2d 927, and the cases therein cited; and
3. Rule 52a of the Federal Rules of Civil Procedure, (28 USCA 52a).

II. THE PAYMENTS RECEIVED BY APPELLEE WERE RECEIVED FROM THE STATE OF CALIFORNIA UNDER THE ASSIGNMENT.

Notwithstanding the diverse and somewhat cryptic methods employed by the Appellee to obtain the pay-

ments aggregating \$20,300.00, it appears clearly from the evidence (Tr., pp. 79-81) (and stipulated to by Appellee, Tr., p. 98) that all of the moneys paid by the State, after it received notice of the Assignment, to the Appellee were paid by state warrants to the order of the "Bank of America, N. T. & S. A., as Assignee of Evans Construction Co." (Finding No. 9, Tr., p. 45). That all of these warrants, except that of January 6, 1949, were deposited in the bankrupt's "Special Account" at the Bank of America (Finding No. 10, Tr., p. 45) and four of the payments to the Bank were made by checks drawn by the bankrupt to the Bank's order, and the other two were by debit vouchers made by the Bank as against this account (Finding No. 12, Tr., p. 46) (without the signature of either the bankrupt or of the co-signor hereinafter referred to) does not change the act that these moneys from the State of California were received by the Bank pursuant to the invalid assignment herein complained of.

The uncontradicted testimony of Mr. Evans before this Court was that when and as these warrants were received from the State of California by the Appellee, an officer of the Bank of America branch in question called Mr. Evans, told him to bring with him a check payable to the Bank's order for a specific amount of money to apply on the loans secured by the Assignment in question, and that it was only then when such checks were issued and delivered to the Bank's Manager that the State Warrants were credited by the Bank to Evans' special account (Tr., pp. 79-81). There

is no evidence whatever that the state warrants were endorsed by the Bank and delivered to Mr. Evans or that Mr. Evans himself deposited said Warrants to his special account.

An examination of Plaintiff's Exhibit No. 5 shows clearly that the consent of Glens Falls Indemnity Company, the prior assignee of the moneys due under this contract to Evans, to the subsequent assignment to the Appellee was *conditioned* upon all proceeds of this contract being paid into the "special account". It specified further the items which could be withdrawn therefrom and required the joint signature on checks of the bankrupt Evans and a designated representative of Glens Falls Indemnity Company. Among the items specified in Plaintiff's Exhibit No. 5 as proper items of withdrawal were expenses incidental to the performance of the State contract by Evans as well as payments on the Bank's loans. This shows clearly that under this *conditional* consent of Glens Falls Indemnity Company to the assignment to the Bank, the Bank agreed to handle these funds as Assignee under the conditions specified in Plaintiff's Exhibit No. 5. When it caused checks to be drawn to its own order by Evans to apply on its loans, the checks were countersigned by a Glens Falls Indemnity Company representative. The funds upon which these checks were drawn were clearly ear-marked and limited to the proceeds of the Assignment complained of. When the Bank used its so-called right of "setoff" for two of the items, it not only violated the terms of its trust in not obtaining the joint signatures above

referred to, but it also took the money evidenced by these two debit vouchers from the same ear-marked proceeds of this assignment. The last item of \$3,785.76 was directly taken by the Bank in the form of the original State warrant without observing even the formality of the "special account" method.

We fail to understand how Appellee can claim that these moneys were received "not from the State of California, but from the bankrupt Evans". Judge Goodman in his opinion and order for judgment (at Tr., p. 37) disposed of this argument. See Findings 9, 10, 11 and 12 (Tr., pp. 45-46) and Conclusions 3² (Tr., p. 47).

III. THE ASSIGNMENT OF THE MONEY PAYABLE UNDER THE STATE CONTRACT IS "AN ACCOUNT" WITHIN THE MEANING OF SECTION 3017, CIVIL CODE.

The right assigned was "an account", even though payable under a written contract with the State.

The assignment (Plaintiff's Exhibit No. 4) of the right of the bankrupt to receive money due, or to become due, under a written contract with the State of California (Plaintiff's Exhibit No. 1) constituted an assignment of an "account" as the term is used in Civil Code Section 3017, was based upon a fair and reasonable construction thereof. See *Wright v. Loaiza*, 177 Cal. 605, 606, where the court stated:

"A book account is defined as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of the contract or from fiduciary relation.' (1 C.J. 597). A necessary ele-

²That notwithstanding the method of payment as set forth in Findings of Fact Nos. 11 and 12, the payments made by the State of California were received by the Bank under the assignment.

ment is that the book shall show against whom and in whose favor the charges are made (1 C.J. 598)'".

and *Schwindt v. Billiwhack Stock Farms*, 45 Cal. App. 2d 208, 210, where it was held:

"A mutual, open and current account arises whenever through a course of dealings reciprocal demands exist which would give to each party thereto an offset against the other in an action by either party, providing that items other than cash appear as credits upon the account. *Gould v. Wood*, 205 Cal. 141, 143 (270 Pac. 183); *Furlow P. B. Co. v. Balboa L. & W. Co.*, 186 Cal. 754, 763 (200 Pac. 625); see also 1 Cal. Jur. (1921) 147, Sec. 8.)"

To show the ridiculousness of Appellee's argument, it is apparent that a sale based on a written, signed contract can result in an account. We refer to a case involving a sale by a field salesman with a written purchase order, subsequent delivery, entry on a ledger sheet, and failure to pay, being *Fresno Credit Bureau v. Batteate* (1951) 102 Cal. App. 2d 545, 546, wherein the court stated:

"The argument advanced is that the proof was of an express contract relating to a single, isolated transaction and that the proof of such an express contract will not support findings of an open book account. This argument is without merit."

The Court said that the evidence was sufficient for judgment on an open book account or "upon an implied contract" and quotes at page 546 from *Hansen v. Burford*, 212 Cal. 100, that "the distinction, as a

matter of pleading, between a book account and an ordinary contact debt not founded on a writing, is only important . . .” on the question of statutes of limitation. See also 1 *Ruling Case Law* 207³ cited by the court in *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246 at 253.

We are here concerned with the statutory definition of an “account” as contained in Civil Code Section 3017 (1)⁴ as it was in force at the time of the transaction in question.

The Legislature obviously would not undertake to act in vain. Where it uses the words italicized above, including “rights under an unperformed contract for work, goods, or services”, it necessarily covers, in such reference, a written contract for “work, good or services” such as that involved between Evans and the State of California in this case. That Evans’ rights

³“The expression ‘outstanding and open book account’ has a well-defined and well understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand and does not include express contracts or obligations which have been reduced to writing, such as *bonds, bills of exchange, or promissory notes.*” (Italics ours.)

“The finding that the amount of the balance claimed by plaintiff is due ‘upon an open book account’ amounts to nothing more than a finding that the Vendor of the goods kept a book account in which he made its charges against the defendant.”

Preston v. Dunn, 33 Cal. App. 747.

⁴“‘Account’ means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance or other instrument for the payment of money; *it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account.*” (Italics ours.)

under this contract would result in an open book account "in the regular course" is best demonstrated by the fact that it did so result (Finding No. 8, Tr., p. 45; Conclusion No. 1, Tr., p. 47). Appellant offered and the trial court received the evidence of a Certified Public Accountant (Tr., pp. 83-91) and the Evans' accounts receivable ledger sheet itself (Plaintiff's Exhibit No. 6) primarily for the purpose of demonstrating that it was an "open book account mutual account, or account stated" in the qualified and specific sense covered by Civil Code Section 3017(1) whether or not it was such an account in the ordinary or abstract sense of those legal terms.

There is no question, that, as stated in the cases cited on page 10 of Appellee's Brief, that "a written contract can never result in an 'account' except by agreement of the parties thereto" for the purposes of the statutes of limitation. Section 3017 accepts the fact that for the purpose of the related code section certain written contracts can result in an open book account. The testimony was that the contract between Evans and the State of California would result in such an account on Evans' books.

The quotation from Ruling Case Law (page 8, supra) made by Appellee (Brief, p. 11) shows the type of "express contract or obligation" which the decisions above referred to contemplate; i.e., "bonds, bills of exchange, or promissory notes". The difference between such documents and of the contract in question between the bankrupt and the State of California (Plaintiff's Exhibit No. 1) is clear.

An examination of the decision in *In re Richards*, 108 F. Supp. 259, cited by Appellee at page 13 of its Brief, indicates its inapplicability to the case at bar. The portion of the opinion quoted by counsel for Appellee (on page 14 of their Brief) from the *Richards* case fails to underscore the fact that it was the “Bank” in that case which “might have kept books showing the amount due, did not so either”. There, as here, the Bank was the assignee of the moneys to become due under the dealers’ agreement. Here, however, the Appellant is not relying on any records kept by the Appellee Bank but is expressly relying upon the book account and records maintained at all times by the bankrupt Evans. The decision in the *Richards* case appears partly, if not primarily, predicated upon the failure of *either* the assignor or the bank to keep books showing the amount due.

It should further be pointed out that the distinction above made by Appellant with respect to the quotation from Ruling Case Law also was considered by Judge Hall in the *Richards* case (at page 262).

The difference between the “reserve account”⁵ and the contract between Evans and the State of California in this case is apparent in that the reserve account in the *Richards* case could not, by any stretch of the imagination come within that part of the definition of “account” in Section 3017(1) which reads: “includes rights under an unperformed contract for work, goods or services . . .”

⁵(construed by the court in the *Richards* case as being “a mere memorandum of the debt which accrued under the terms of the written contract”)

The right assigned could only arise out of a written contract.

We concede that under the Government Code Evans' cause of action against the State could only arise lawfully under the contract in question (Plaintiff's Exhibit No. 1). However, since that contract and Evans' right to the payment of money thereunder clearly come within the definition of "account" in Section 3017(1), Civil Code, as above discussed, we fail to see the materiality of that fact.

Subsequent legislation clearly shows compliance with Civil Code sections necessary at the time of this assignment.

We have read with interest the ingenious argument of the Appellee whereby it attempts to use the 1953 amendment to Section 3017 to support its contention that Appellee's compliance with the Uniform Assignment of Accounts Receivable Act was not required in this case. It may well be true that when a statute is recast "to *clarify* its meaning without *changing* the *substance* of its provisions, the legislative intent of the old statute will be determined as that intent is clarified in the new statute". The cases cited by counsel for the Appellee on pages 18, 19 and 20 of their Brief seem to so indicate. However, when the 1953 amendment, in toto, is examined, it will be seen that the 1953 amendment did far more than "clarify" the meaning of the old Section 3017 and actually and materially changed the substance of its provision.

We have quoted above, as did Appellee, certain of the provisions of Section 3017 Civil Code as it was in force in 1948, but for purposes of this comparison we will quote it in full:

1948

"Section 3017. (Definitions.)
In this chapter

(1) "*Account*" means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account.

(2) "*Assignment*" shall include any transfer, pledge, mortgage or sale.

(3) "*Creditor*" means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) "*Debt*" means the indebtedness owing on an account.

(5) "*Debtor*" means any person by whom an account is owing to the assignor.

(6) "*Filing officer*" means the county recorder of the county in which the assignor has its principal place of business within this State, or if the assignor has no place of business within this State then the county in which the assignor resides."

1953

"Section 3017. (Definitions.)
In this chapter

(1) "*Account*" means a debt, due or to become due, arising out of the sale, storage, transportation, care, repair, processing, manufacture or other improvement of tangible personal property, or arising out of a contract therefor, or arising out of the rendition of personal services which in the regular course of business will result in an open book account; provided, however, the 'account' does not include:

(a) Any debt evidenced by or arising under a judgment, note, bill of exchange, acceptance, chattel mortgage, trust receipt, lease, or contract of conditional sale (meaning a deferred payment contract reserving title in the seller).

(b) Any debt which arises from the sale of tangible personal property or from the sale or assignment of the rents, issues, profits, products, proceeds or increase of tangible personal property, if at the time of the assignment of such debt the assignee is the owner of an encumbrance or a lien upon the said personal property, which lien or encumbrance has been duly perfected against third persons pursuant to any applicable state or federal law or is so perfected within 10 days

1948

1953

after the assignment of such debt;

(c) *Any debt arising under a contract for a work of improvement to real property as defined in Section 1182 of the Code of Civil Procedure or a public work of improvement as defined in Section 4200 of the Government Code.* (Italics ours.)

(2) “‘Assignment’ shall include any transfer, pledge, mortgage or sale.

(3) “‘Creditor’ means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) “‘Debt’ means the indebtedness owing on an account.

(5) “‘Debtor’ means any person by whom an account is owing to the assignor.

(6) “‘Filing officer’ means the county recorder of the county in which the assignor has its chief place of business within this State, or if the assignor has no place of business within the State then the county recorder of the county in which the assignor resides.

(7) “‘Value’ means any consideration sufficient to support a simple contract, including an antecedent debt or liability where an account is taken in satisfaction thereof or as security therefor.”

The exclusion [(1) (c)] which is italicized by us above indicates clearly the desire of the Legislature⁶ to thenceforth exclude from the effect of the Uniform Assignment of Accounts Receivable Act the type of contract here involved. In other words, by reason of legislative action taken 5 years after the Evans-to-Bank of America assignment was made, the court is asked by the Appellee to construe the old Section 3017(1) as not requiring such exclusion. We maintain that it was only because financial institutions were able to persuade the Legislature that this type of action was permissible under the old section where Sections 3017 et seq., Civil Code, were not complied with by them, and that the requirement of such compliance was unduly arduous for such institutions, that the Legislature in 1953 granted them the exclusion, without retroactive effect. That this recasting of Section 3017 does considerably more than clarify the meaning of the former section is also, we think, demonstrated by the omission in the new Section of the words "it includes rights under an unperformed contract for work, goods and services . . ." and the substitution therefor of the specific language of Subdivision (1) (c) thereof italicized above.

⁶Incidentally at the instigation of the California Bankers' Association, its member and nonmember banks for reasons which will be more particularly hereinafter discussed

IV. THE ASSIGNMENT BEING INVALID (VOID), APPELLANT MAY RECOVER ALL SUMS PAID TO APPELLEE UNDER SAID ASSIGNMENT.

Counsel for Appellee (commencing on page 21 of their Brief) first undertake to minimize the effect of the decision in *Menick v. Carson*, 96 F. Supp. 817, by attempting to point out that the court's holding, as to the right of a Trustee in Bankruptcy to recover proceeds paid to an Assignee under an assignment invalid for non-compliance with Section 3019, Civil Code, is purely dicta. On the contrary, a fair and complete review of Judge Byrne's decision in *Menick v. Carson* can result only in the conclusion that all of the issues passed upon by him in his opinion, including the one questioned by Appellee, were necessary to the decision of the case and not merely dicta. On page 820, the court proceeds to analyze the complaint after saying,

“With these principles in mind, we may now proceed to examine the allegations of the complaint.”

Clearly, the court felt, and we think properly, that the preceding discussion, analysis and comparison of the Uniform Assignment of Accounts Receivable Statute with other California statutes designed and enacted by the Legislature for the purpose of avoiding “secret liens” was and is a necessary preamble to all of the conclusions reached by the court. In this connection, we call the court's attention to the fact that Hon. Michael J. Roche in *Costello, Trustee v. H. & B. Paint Co.*,⁷ in his Findings and Judgment in favor of

⁷No. 39571, USDC, NDC.

the plaintiff trustee expressly made applicable to an identical challenge of an assignment the decision of *Menick v. Carson* as to (1) the subject of the recoverability of payments made to the Assignee prior to the institution of the action to avoid the assignment and (2) that Section 3019, Civil Code, is in pari materia with Sections 2957 and 3440, Civil Code.

There is no question that *Menick v. Carson* lays down the statutory rule that one of the purposes of Section 3019, Civil Code, "is to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtors (assignors) financial position". Contrary to the observations of counsel for Appellee (on pages 23 through 29 of their Brief) there is ample support for Judge Byrne's view in regard to both of the points above mentioned with which Judge Roche is already in agreement. It is true that the decision of the United States Supreme Court in *Corn Exchange National Bank v. Klauder*, 318 U.S. 434 (1933), by reason of its construction of the then provisions of Section 60(a) of the Bankruptcy Act as applied in California and the other so-called "notification" states, made it advisable for financial institutions to support and procure legislative relief in the form of the adoption by California and other states of the Uniform Assignment of Accounts Receivables Acts. However, likewise contrary to the contentions of the Appellee, the Supreme Court in the *Klauder* case clearly stated that the purpose of Section 60(a) of the Bankruptcy Act is, notwithstanding the fact that Section 60 involves only recoverable preferences (within 4 months prior

to bankruptcy), a statute designed to prevent "secret liens". Mr. Justice Jackson on page 438 of the *Klauer* decision says:

"The Committee of the House of Representatives which reported Section 60(a) as quoted above was fully aware of the vicissitudes of its predecessors. These are recited in detail elsewhere, and need not be repeated here beyond a general statement that for thirty-five years Congress has consistently reached out to strike down secret transfers and the courts have with equal consistency found its efforts faulty or insufficient to that end. Against such a background Section 60(a) was drawn and reported to Congress with this explanation of its purpose and effect: 'The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. It is provided that the transfer shall be deemed to have been made when it has become so far perfected that neither a bonafide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. As thus drafted it included a failure to record any other ground which could be asserted by a bona-fide purchaser or a creditor of the transferor, as against the transferee. A provision also has been added which makes the test effective even though the transfer may never have actually become perfected.'

Whatever advantages may inhere in non-notification financing which might have made Congress reluctant to jeopardize it, the system also has characteristics which make it impossible for us to conclude that it is to be distinguishable from the secret liens Congress was admittedly trying to reach." (Italics ours.)

There is nothing in the texts cited by Appellee which is or obviously could be inconsistent with the foregoing clear expression of the Supreme Court on this subject. The *M. M. Landy, Inc. v. Nicholas*, 221 Fed. 2d 923, decision cited by Appellee does not support its contention that the purpose of Section 3019 Civil Code was not to prevent secret liens of transfers. It merely affirms what we conceded; i.e., that this statute was the direct result of the 1938 (Chandler Act) amendments to Section 60(a). These later amendments merely served to exempt from the harshness of the previous Section 60(a) rule, assignments which complied with State laws similar to those which were finally enacted in California in 1943 (Section 3017 Civil Code, et seq.).

The decision in *Smith v. Harris*, 127 Cal. App. 2d 311, makes a proper distinction between Sections 3017, et seq., and Sections 2957 and 3440 of the Civil Code applicable only, however, to the facts of that case in which both the assignee and the assignor resided outside of California. The reasons given by the court in the *Smith v. Harris* case for the distinction, show clearly the inapplicability of the decision to the case at bar. Furthermore, that transfers (even as to tangible personal property) were contemplated by the Legislature at the time of its first adoption of Section 3017 Civil Code (1943) is demonstrated by the definitions then and now contained in that statute that "assignment shall include any transfer, pledge, *mortgage* or sale". (Italics ours.)

Finally, counsel for Appellee adopt (on page 29 of their Brief) a somewhat tenuous distinction, which

we term one “without a difference” between a transfer which is “void” and one which is merely “invalid.”

The court in *Kirkbride v. Hickok*, 98 N.E. 2d 815, states at 820:

“The word ‘invalid’ as used in a statute providing that where Testator dies leaving issue of his body or an adopted child and his Will contains devises or bequests to charitable institutions such devises or bequests are *invalid*, unless Will was executed at least one year prior to death of Testator means *void* or without validity.” (Italics ours.)

By cross-reference, *Words and Phrases* Vol. 44, page 319, treats “void” and “invalid” as synonymous, and the same work cites many of the same cases in its treatment of both the words “void” and “invalid.”

For an instance where “invalid”, as used in a statute, means “void” and of no force and effect, see *Dreidlein v. Manger*, 220 Pac. 1107, at 1108 (Mont.).

“The term ‘invalid’, when used in a statute providing that, if any foreign corporation does business without complying with domestic law all accounts and contracts made by it prior to its qualification ‘shall be void and invalid’, is used interchangeably with ‘void’ and adds no force to it, but in this instance will be construed as voidable merely, rather than absolutely void.”

Mutual Ben. Life Ins. Co. v. Winne, 49 Pac. 446, 448, 450 (Mont.).

The words “void” and “invalid” when used in regard to contracts which are immoral or against public policy, usually mean voidable at the option of one of

the parties or someone legally interested therein. *Doney v. Laughlin*, 94 N.E. 1027, at 1028.

a. Collection by defendant did not cure defect in assignment.

On the converse of the above caption, counsel for Appellee (at page 30) cite two Second Circuit cases: *Lee v. State Bank*, 38 Fed. 2d 450 (1930) and *Wallradt v. Miller*, 45 Fed. 2d 686 (1930.) Neither of these cases are in point for several reasons. They were decided three years before *Corn Exchange Bank v. Klauder* was decided and before Section 60(a) of the Bankruptcy Act was amended (1938), and therefore do not represent situations analogous to the case at bar. As appears clearly in both cases, the interpretation contended for by the Appellee, as made by the Court of Appeals for the Second Circuit, applied only to *actively* fraudulent conveyances, not constructively fraudulent conveyances (such as California Sections 2957, 3017 et seq., and 3440 Civil Code). In other words, the "secret lien" theory which Appellee ardently seeks to make inapplicable to the case at bar is actually and necessarily inapplicable to the *Lee* and *Wallradt* cases. A transfer or assignment made "with intent to hinder or delay creditors," under the decisions above cited, would merely be voidable, and presumably the collection of accounts thereunder prior to the institution of a suit to set aside such actively fraudulent assignments will cure the defect therein because they were notorious and not secret assignments. In neither of the Second Circuit decisions were there any statutory requirements constituting conditions precedent to the validity, as against creditors of

the transferor, of assignments of accounts receivable. Hence, in the absence of a recoverable preference, as to collections made prior to the invalidity of the assignments being judicially declared, collections made by the assignee were invulnerable. For a complete review of applicable legislation on the subject of assignments of accounts receivable, which supports Appellant's position that the Uniform Assignment of Accounts Receivable Act is designed to prevent "secret liens," we call the court's attention to 33 *Cal. Law Rev.* 40-111 at 60 and at 102.

See also 38 *Cal. Law Rev.* 308-313, and 3 *Collier on Bankruptcy* 900-904.

The principal distinction between the case at bar and the cases cited by Appellee (on pages 32, 33 and 34 of its Brief) is the fallacy of the assumption by Appellee that mortgages are not synonymous with assignments and their omission to consider that, as distinguished from the cases cited therein. Here, the assignment in question was, although absolute on its face, admittedly for *security purposes only*. The money which is paid by the assignor's debtor to the assignee is not, as Appellee contends, the money of the debtor but the money of the assignor. (See post.) As we pointed out in our Opening Brief, this distinction is borne out by reference to the decisions of this court (*England v. Moore Equipment Co.*, 94 F. Supp. 532 (affirmed by this court, 185 Fed. 2d 1019) cited on page 10); the Supreme Court of the State of California in *Noyes v. Bank of Italy*, 206 Cal. 266 (cited on page 10); and of the Supreme Court of the United

States in *Buffum v. Peter Barceloux Company*, 289 U.S. 227, 77 L. Ed. 1140 (cited on page 12).

b. Money collected by appellee was bankrupt's, not California's.

In its argument as to the ownership of the money received by Appellee in the above matter, Appellee urges that the Appellant may recover only the bankrupt's property under Section 70(e) of the Bankruptcy Act. The Trustee in Bankruptcy, under Section 70(a) (4), Bankruptcy Act is vested, by operation of law, with the title of the bankrupt . . . to "property transferred by him in fraud of his creditors," and (5) to property, including rights of action, which prior to the filing of the petition he could by any means have transferred . . . If, as we pointed out above, the assignment in question is invalid, void or voidable by any creditor under Civil Code Section 3019, it is recoverable by the Appellant Trustee under Section 70(e) Bankruptcy Act (11 USCA 110e).⁸

This would give the trustee no right of action against the State of California but clearly gives that right to the Appellant against the Appellee assignee and recipient of the moneys pursuant to the void assignment. *To adopt the Appellee's theory on this*

⁸"Section 70. *Title to Property.*

e.(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

score would be contrary to public policy generally and to the express legislative policy against "secret liens" because it would obviously result in a race between the assignee under a void or voidable assignment and the institution of bankruptcy proceedings and/or actions by trustee or creditors to void such assignments. It would put a premium upon the diligent assignee under a voidable assignment at the expense of the creditors who, because of the non-compliance by such assignee with the provisions of Section 3019 Civil Code had no knowledge of the constructively fraudulent assignment in question. We must read the provisions of Section 70(e) in conjunction with the provisions of Section 70(a) and when they are so read together it is clear that the laudable purposes of the Uniform Assignment of Accounts Receivable Act would be substantially defeated by the strained construction which Appellee seeks to have this court put upon the transaction in question.

CONCLUSION.

In view of the facts and law hereinabove set forth it is Appellant's contention that the District Court erred in holding that the payment of the assigned account prior to the filing of the bankrupt's petition in bankruptcy extinguished the obligation, and that Appellant had no cause of action under Section 70e of the Bankruptcy Act, and that therefore the judgment of the District Court, August 6, 1956, should be

by this court reversed, with instructions to the lower court to enter judgment for Appellant as prayed.

Dated, San Francisco, California,

May 3, 1957.

Respectfully submitted,

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By ARTHUR P. SHAPRO,

Attorneys for Appellant.

DANIEL ARONSON, JR.,

Of Counsel.

No. 15323

**United States
Court of Appeals**
for the Ninth Circuit

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

JAN 14 1957



No. 15323

United States
Court of Appeals
for the Ninth Circuit

FLOYD SMITH,

Appellant,

VS.

KENNETH BUCK and KENNETH BINDER,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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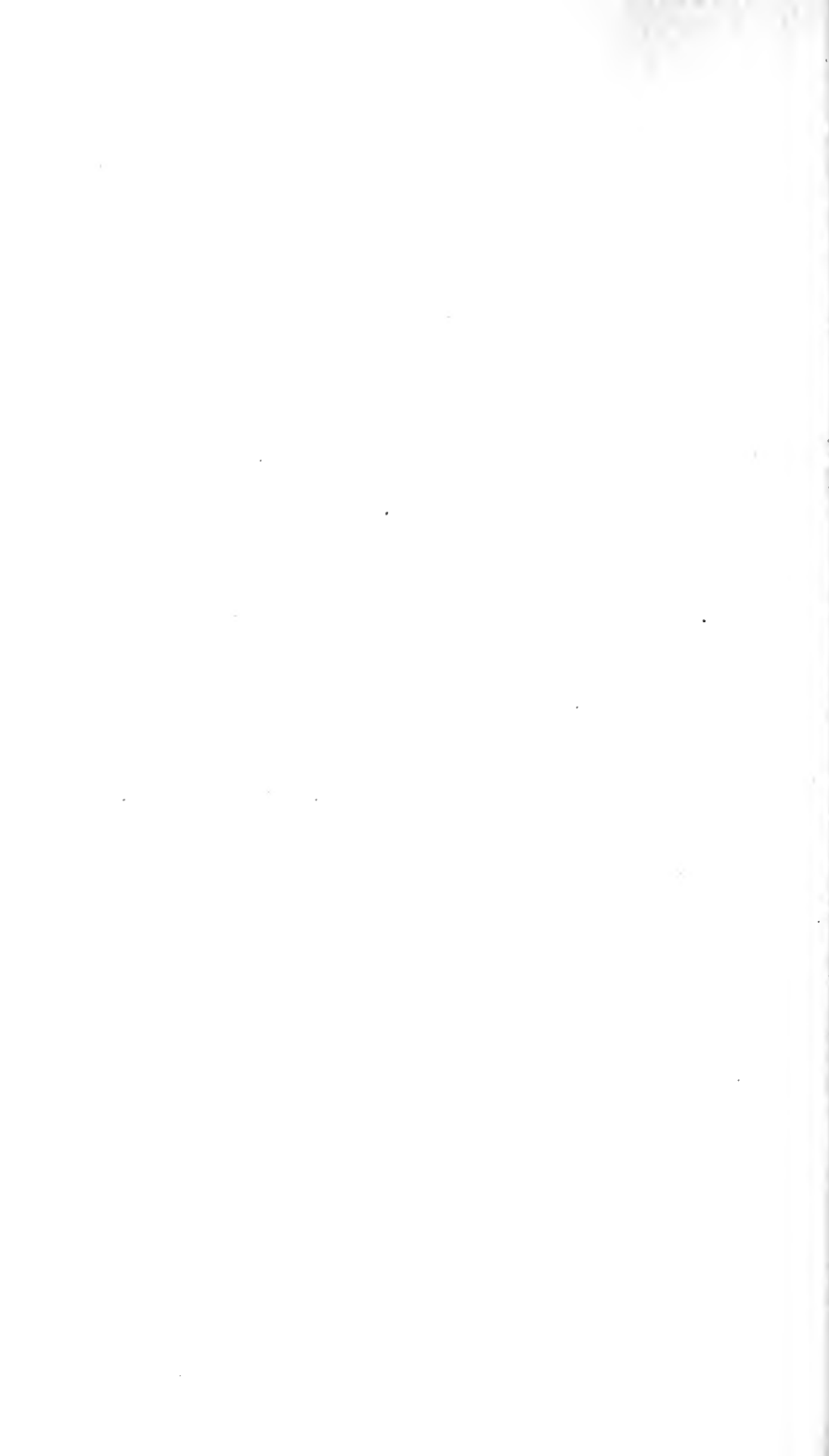
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In the United States District Court
for the District of Oregon

No. 8421

FLOYD SMITH,

Plaintiff,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendants.

Before the Honorable Gus J. Solomon.

PRE-TRIAL ORDER

Appearances:

Attorneys for Plaintiff:

Reuben Lenske, David Spiegel, Lenske,
Spiegel & Spiegel.

Attorneys for Defendants:

McGuire, Shields, Morrison & Bailey,
William Morrison.

Nature of Proceedings

This is an action by plaintiff to recover damages for injuries to person, which plaintiff claims he sustained by reason of the negligence of defendants; the action arises out of an accident which occurred on October 31, 1955, when the trailer of a truck assembly owned by the defendant, Kenneth Binder, and driven by the defendant, Kenneth Buck, struck the plaintiff.

Agreed Facts

I.

The plaintiff is a resident and citizen of the State of Washington; the defendants are residents of the State of Oregon.

II.

The amount in controversy, being the amount of damages claimed by plaintiff and denied by defendants, exceeds the sum of \$3,000.00 exclusive of injuries and costs.

III.

At all times herein mentioned U. S. Highway 26 was and now is a duly constituted and traveled highway in the State of Oregon, running in a southwesterly and northwesterly direction in Clackamas County and adjacent counties, and that the incident hereinafter described occurred on said highway approximately six miles east of the town of Government Camp, Oregon.

IV.

That on October 31, 1955, plaintiff was outside of his passenger automobile being in the course of putting on chains on the rear wheels of the same and the defendant Kenneth Buck was driving a truck and trailer owned by the defendant, Kenneth Binder, as his agent, in a southwesterly direction on U. S. Highway No. 26.

V.

That at said time and place the trailer attached to said truck struck some portion of the body of

plaintiff and that plaintiff suffered some injuries thereby.

Plaintiff's Contentions

I.

The collision and injury resulting to plaintiff on account thereof were proximately caused by the negligence, carelessness, recklessness and unlawful conduct of defendants in the following respects:

(a) In driving their vehicle at said time and place without chains or other apparatus to prevent the same from skidding or sliding on a roadway made slick by falling and/or packed snow.

(b) In failing to keep a lookout.

(c) In failing to maintain control of said vehicle.

(d) In driving said vehicle at an excessive rate of speed considering the time, place and circumstances.

(e) In attempting to drive said truck and trailer through a space bounded by the plaintiff on one side and pedestrians on the other side, too narrow under such circumstances to permit the safe passage of said vehicle under the circumstances then and there present without contact with one or the other.

(f) In failing to sound his horn or give any warning of his approach.

II.

That as a direct and proximate result of the negligent, careless and reckless conduct of defendants, plaintiff was severely, permanently and painfully injured and suffered general and special damages in the sum of \$50,000.00.

Defendants' Contentions

I.

That defendants or either of them were not guilty of any negligence.

II.

That at the time and place of the collision referred to herein, plaintiff was himself careless, reckless and negligent in the following particulars:

(a) In failing to keep a proper lookout.

(b) In placing himself in a position of danger on the traveled portion of the highway.

(c) In assuming the risk then and there attendant.

III.

That the careless, reckless and negligent acts of plaintiff as hereinabove set forth contributed to and proximately caused the injuries plaintiff sustained.

Issues

1. Were the defendants, or either of them, negligent in any of the particulars contended for by plaintiff?

2. If defendants were negligent, was such negligence, if any, the proximate cause of plaintiff's injuries?

3. Was plaintiff guilty of negligence contributing to the accident and plaintiff's injuries in the particulars contended for by defendants?

4. What injuries did plaintiff sustain?

5. Is Plaintiff entitled to any damages for such injuries?

6. If plaintiff is entitled to damages, what amount of damages should he be allowed?

It Is Hereby Ordered that the foregoing is the Pre-trial Order in the above-entitled cause; that it supersedes the pleadings, which are hereby amended to conform hereto, and that said pre-trial order shall not be amended upon trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 22nd day of May, 1956.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 22, 1956.

In the United States District Court
for the District of Oregon

Civil No. 8421

FLOYD SMITH,

Plaintiff,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendants.

ORDER

This case came on for trial before the Honorable Claude McColloch, Chief Judge of the above-entitled Court, plaintiff appearing in person and by Reuben Lenske, one of his attorneys, defendants appearing by W. H. Morrison and Robert Jones of their attorneys, a jury was duly empanelled and sworn, opening statements were made by counsel, evidence was introduced by plaintiff, and at the close of plaintiff's testimony defendants moved the Court for a dismissal on the ground that upon the facts and the law the plaintiff had shown no right of relief. The Court, having heard arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered that defendants' motion for a judgment of dismissal be and the same is hereby allowed.

/s/ CLAUDE McCOLLOCH,
Judge.

Done in open court this 24th day of May, 1956.

[Endorsed]: Filed May 24, 1956.

[Title of District Court and Cause.]

MOTION

Comes now plaintiff and moves the Court for an Order granting him a new trial in the above-entitled cause and if judgment of dismissal was entered on or about May 22, 1956, that said judgment be set aside. This Motion is based upon error of the Court in discharging the jury empaneled to try said cause and in ordering the said dismissal and in holding adversely to the plaintiff on the issues presented, i.e., on the issue of negligence of the defendants and proximate cause of defendants' trailer striking and injuring plaintiff and on the issue of contributory negligence if the Court's Order of dismissal was based thereon.

/s/ REUBEN LENSKE,
Of Attorneys for Plaintiff.

I hereby certify that on the 31st day of May, 1956, I served the foregoing Motion upon Maguire, Shields, Morrison & Bailey, attorneys for defendants, by then depositing a full, true and correct copy thereof in the United States post office addressed to the said Maguire, Shields, Morrison & Bailey at 723 Pittock Block, Portland, Oregon, and prepaying the postage thereon.

/s/ REUBEN LENSKE,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

ORDER

A motion for a new trial heretofore filed by plaintiff came on for argument on the 13th day of August, 1956, before the Honorable Claude C. McCulloch, Chief Judge of the above-entitled Court, plaintiff appearing by David Spiegel, one of his attorneys, and defendants appearing by W. H. Morrison, one of their attorneys, and after hearing arguments of counsel and being fully advised in the premises,

It is Hereby Ordered and Adjudged that the said motion be and the same is hereby denied.

Dated this 30th day of August, 1956.

/s/ CLAUDE McCULLOCH,
Judge.

[Endorsed]: Filed Aug. 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Kenneth Buck and Kenneth Binder, above-named defendants, and McGuire, Shields, Morrison & Bailey, William Morrison, their attorneys.

Notice is hereby given that the plaintiff herein, Floyd Smith, does hereby appeal the judgment of

dismissal entered herein on or about May 22, 1956, and from the Order denying said plaintiff's motion that said judgment be set aside and for a new trial entered herein August 13, 1956, and the whole of said judgment and order, to the Circuit Court of Appeals, Ninth Circuit, United States Circuit Court of Appeals.

/s/ DAVID M. SPIEGEL,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 11, 1956.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, the above-named defendants, Kenneth Buck and Kenneth Binder, recovered a judgment of dismissal against Floyd Smith, the plaintiff herein in a civil action before the Honorable Claude McColloch, a Judge in and for said Court, said judgment having been rendered on the 22nd day of May, 1956.

And, Whereas, the said Floyd Smith is about to appeal from said judgment to the United States Court of Appeals for the Ninth Circuit, including the costs and disbursements therein.

Now, Therefore, We, Reuben G. Lenske, attorney for appellant, and Frances Slossar of the County of Multnomah, State of Oregon, surety, do hereby jointly and severally undertake and promise, on

the part of the appellant, that said appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal.

[Seal] /s/ REUBEN G. LENSKE,

[Seal] /s/ FRANCES SLOSSAR.

State of Oregon,
County of Multnomah—ss.

Frances Slossar, whose name is subscribed to the within undertaking as surety, being duly sworn, says: That she is a resident and freeholder within the State of Oregon; that she is not a counsellor or attorney at law, sheriff, clerk or other officer of any court, and is worth the sum of Two Hundred Fifty (\$250.00) and no/100 Dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

/s/ FRANCES SLOSSAR.

Subscribed and sworn to before me this 10th day of September, 1956.

[Seal] /s/ R. G. LENSKE,

Notary Public for Oregon.

My Commission Expires: 7-20-57.

[Endorsed]: Filed Sept. 11, 1956.

United States District Court
District of Oregon
No. Civil 8421

FLOYD SMITH,

Plaintiff,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendants.

May 22, 1956.

Before: Honorable Claude McColloch, Chief Judge.

Appearances:

REUBEN G. LENSKE and
DAVID M. SPIEGEL,
Of Attorneys for Plaintiff.

WILLIAM H. MORRISON,
Of Attorneys for Defendants.

TRANSCRIPT OF TESTIMONY

(A jury having been duly and regularly empaneled and sworn, opening statements were made to the jury by counsel for the respective parties, and thereafter the following proceedings were had.)

FLOYD SMITH

the plaintiff herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lenske:

Q. What is your full name, Mr. Smith?

A. Floyd Smith.

Q. Where do you reside?

A. Seattle, Washington.

Q. Where were you residing on October 31st, 1955? A. Seattle, Washington.

Q. Have you been a resident of Seattle ever since then until now? A. Yes, sir.

Q. Prior to the time that you moved to Seattle, where did you live? A. Roseburg, Oregon.

Q. For how long did you live in Roseburg?

A. About two years and a half.

Q. What was your occupation on October 31st, 1955? A. I was a salesman.

Q. For whom?

A. Western Motels & Investments.

Q. By whom are you employed now?

A. The same company. [2*]

Q. Will you tell the jury just what in the line of work you were doing on October 31st, 1955?

A. I was taking Mr. Howard from Seattle, Washington, to Bend, Oregon, for the purpose of

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of Floyd Smith.)

negotiating a trade between him and a gentleman there in their motels.

Q. By the way, with whom do you live in Seattle, Washington?

A. My wife and two children.

Q. How old are your children?

A. Twelve and fourteen.

Q. Were you so living in October, 1955?

A. Yes, sir.

Q. Would you please draw out on this black-board the scene where the accident happened, to the best of your ability?

A. I can try to. I was approximately here. The other car across from me was over in here, and there was two or three other vehicles back in here.

Q. Now, would you indicate the directions there so that the jury will know?

A. This would be traveling east.

Q. Then this is the main highway that goes to Eastern Oregon beyond Government Camp; is that correct?

A. Yes. It would be 26.

Q. Will you make a dot where you were immediately before you were hit?

(The witness marked on the drawing as requested.) [3]

Q. And where Mr. Howard was immediately before he was hit.

(The witness marked on the drawing as requested.)

(Testimony of Floyd Smith.)

Q. Very well.

A. I was closer to the car than that shows.

Mr. Lenske: Did the jury hear that?

A. I was closer to the car than the dot shows.

Q. Very well, Mr. Smith, what kind of an automobile were you driving?

A. Hudson four-door sedan.

Q. What year model? A. 1954.

Q. Tell the jury approximately what time it was that you brought your automobile to rest at that side of the road.

A. Well, approximately 4:00 o'clock.

Q. Four o'clock in the afternoon?

A. P.M., yes.

Q. As of what date?

A. October 31st, 1955.

Q. Now, what were the weather conditions and the road conditions at that time in that area?

A. Well, there was some snow on the road, and it was snowing lightly.

Q. For what reason did you park your car? Why did you stop it or park it?

A. To put my chains on. [4]

Q. What necessity was there for chains at that time and place? A. I lost traction.

Q. Now, where did you park your car with relation to the guardrail? First, let me ask you was there a guardrail along the highway there?

A. Yes, there was.

Q. What kind of a guardrail?

A. Steel; kind of a wide band.

(Testimony of Floyd Smith.)

Q. Was it painted?

A. I think it was painted white.

Q. Where did you stop your car with relation to the guardrail?

A. Oh, I would say it would be approximately in two or three feet of it.

Q. Was there any snow between where you stopped your car and the guardrail?

A. Yes, there was some there. It had been plowed out.

Q. Were you able at that time and place to bring your car any closer to the guardrail than you did?

A. I probably could have, but I wouldn't have had room to have worked on the chain to get it on.

Q. How much space did you leave there so you could put your right chain on your right rear wheel?

A. As I say, it could have been two or three or four feet. I don't recall exactly.

Q. Now, would you have had control of your car if you continued [5] to drive it at that time and place without putting chains on? A. No, sir.

Q. What else happened before the defendant's truck and trailer came and hit you? What was done by other cars? You can describe the situation as it existed at that particular time.

The Court: 'Ten minutes' recess.

(Short recess.)

Mr. Lenske: Will you read the last question?

(Last question read.)

(Testimony of Floyd Smith.)

A. A woman pulled up on the opposite side of the highway going the same direction, almost opposite me. And someone from one of the other cars that was parked down the highway came up to help her put on the chains.

Q. (By Mr. Lenske): Were there any other vehicles parked in that area at that time?

A. Yes.

Q. How many?

A. I don't recall exactly. After it was over with I remember there was three.

Q. Will you tell the jury what you did after you parked your car?

A. I got out and opened the trunk and got the chains out. Mr. Howard placed one behind the right rear wheel and I placed one behind the left rear wheel, and I got a blanket out and laid it on the highway and attempted to put the chain over [6] the left rear wheel. And I heard a roar of a truck, and somebody hollered something at me, and I scrambled to my feet. And as I was doing that some pellets of snow struck me across the back of the legs, and then the truck struck me across the back, throwing me into the car, and passed on.

Q. Did the truck strike you or the trailer?

A. Well, it would be the trailer.

Q. What part of you was hit by the trailer?

A. The lower part of my back.

Q. Against what part of your automobile were you struck? A. The left rear fender.

Q. What effect did it leave on the left rear

(Testimony of Floyd Smith.)

fender? A. It bent it in.

Q. What part of your body hit the left rear fender of your automobile?

A. My upper left leg from my head down to my knee.

Q. When you were lying down to put the chain on how close to your automobile were you at that time? A. Oh, right up close to it.

Q. When you jumped up, how much distance were you from your automobile?

A. Well, I couldn't say exactly. I was pretty close to it.

Q. Then what happened after that?

A. You mean after I was struck?

Q. Yes. [7]

A. Well, I grabbed my back and looked over to my left in time to see Mr. Howard flying through the air like this and dropping in front of the right rear wheels of the trailer, which passed over him.

Q. Then what happened to the truck and trailer after the trailer struck you and ran over Mr. Howard? A. It stopped.

Q. How far did it go before it stopped?

A. Oh, it could have been 10 or 12 feet.

Q. Then in what position were the truck and trailer immediately after this?

A. Well, the truck would be up in the middle of the road and the trailer was on a slight angle downhill.

Q. Now, immediately before you were struck, how much clear distance was there between where

(Testimony of Floyd Smith.)

you were and between where the automobile of the lady was on the other side of the road at that time?

A. How much distance between my car and the one across?

Q. Yes.

A. Well, I judge it to be somewhere between 30 and 40 feet.

Q. Now, what pain did you suffer immediately after you were struck?

A. Well, severe pain in my back and my left leg and a terrific headache.

Q. Did you go anywhere for treatment at any time after that? [8]

A. I went to Providence Hospital.

Q. Who examined you there?

A. Dr. Marxer.

Q. For how long?

A. Well, just a short time that night.

Q. I mean, how long did his examination of you take at that time?

A. Well, I was there about an hour, I should judge.

Q. Then where did you go after that?

A. I went to the City Center Motel.

Q. Did your pain cease or did it continue?

A. It continued.

Q. Tell the jury whether or not you still have pain resulting from this accident.

A. Yes, I do have.

Q. Where?

(Testimony of Floyd Smith.)

A. In my lower back and left leg, and a little shooting pain down my right leg.

Q. Did you have medical treatment since the original examination by Dr. Marxer?

A. Yes, sir.

Q. By whom?

A. Dr. Grossman and Dr. Cohen and Dr. Dooley, and therapy at Dr. Dooley's office in Seattle.

Q. Two of the doctors are here in Portland and one was in Seattle, Washington? [9]

A. Yes, sir.

Q. What was the condition of your health immediately prior to the time you were struck on October 31st, 1955?

A. Pretty good.

Q. Did you have any back pains of any kind prior to being struck?

A. No, sir.

Q. Did you have any side pains prior to your being struck?

A. No, sir.

Q. Prior to your being struck on October 31st, 1955, did you suffer any pain of any kind when having intercourse with your wife?

A. No, sir.

Q. What has been the fact in that respect since then?

A. Well, I have had severe headaches.

Q. Will you describe to the jury just what kind of headaches?

A. Well, they start back here and spread over the top of my head. It feels like the top of my head was going to come off.

Q. What pains do you suffer now in your leg or back? I mean up to the present time. Has any

(Testimony of Floyd Smith.)

of that pain continued? A. Yes, sir.

Q. After the collision, or after this occurrence on October 31st, 1955, were you able to work immediately after that?

A. I wasn't much good for quite a little while.

Q. Why?

A. Well, because of the severe pain and headaches and after effects [10] of the shock, I suppose.

Mr. Lenske: You may cross-examine.

Cross-Examination

By Mr. Morrison:

Q. Mr. Smith, I understand you estimate the right wheels of your car could have been two, three or four feet from the guardrail; is that correct?

A. Yes, sir.

Q. Have you looked over the scene of the accident at any time when there was no snow on the ground? A. No, sir.

Q. You have not. Your left wheels would be out towards the center of the highway?

A. Yes, sir.

Q. You said that there was a lady who had stopped her car opposite you. Was that before you stopped or after you stopped? A. After.

Q. After you stopped. She was going in the same direction you were going, was she not?

A. Yes, sir.

Q. And she stopped on the left side of the high-

(Testimony of Floyd Smith.)

way off the main traveled portion of the highway, did she not?

A. There was a lot of snow on the highway there, sir. I suppose it would be off of it. [11]

Q. I gathered that from the distance, the estimate of distance, you placed her car away from yours. How far did I understand you to say that her car was away from yours?

A. At that time I estimated between 30 and 40 feet.

A. About 30 to 40 feet. It was practically opposite you with the exception of being a little bit west, was it not? A. Yes, sir.

Q. So then her car, when she brought it to a stop, had to be off the paved portion of the highway, didn't it? That highway is 26 feet wide.

A. Oh, yes.

Q. Then you got down to work on the chain on the left rear wheel; is that correct? A. Yes.

Q. Were you behind it or in front of it?

A. I was beside it.

Q. Did you get on your knees?

A. I was lying on the blanket at one time.

A. At one time you were lying down on the blanket? A. Yes, sir.

Q. While you were working on this wheel, putting chains on this wheel, you heard the roar of a motor approaching, did you not? A. Yes, sir.

Q. And you started to get up and then you were hit; is that it? [12] A. Yes, sir.

Q. I take it you didn't know what hit you then?

(Testimony of Floyd Smith.)

A. Not at that moment; no, sir.

Q. You found out afterwards, but at that time when you were hit you didn't know what had struck you; is that correct? A. That is right.

Q. The drawing that you have made, that is just a rough drawing, is it not? You didn't intend that to be absolutely accurate, did you?

A. No, sir.

Q. Isn't it a fact that as you look that over, weren't you more past the center of that curve?

A. Possibly.

Q. You were following your business at that time of selling motels, were you not? You were specializing in that, were you not?

A. Yes, sir.

Q. And you also owned a store in Seattle and that was being operated by a manager, was it not?

A. Yes, sir.

Q. You were going to Bend; is that correct?

A. Yes, sir.

Q. At the time of this accident. You left from Portland? A. I left from Seattle.

Q. You had left from Seattle and you went through Portland, [13] didn't you?

A. Yes, sir.

Q. Did you drive your car away from the scene of the accident? A. Yes, sir.

Q. Did you drive it to Portland that night?

A. Yes, sir.

Q. And you went there to the hospital and were examined by Dr. Marxer? A. Yes, sir.

(Testimony of Floyd Smith.)

Q. You were in the hospital about an hour, were you not?

A. That could have been; yes, sir.

Q. Then when did you next see a doctor, approximately? A. Oh, probably a week.

Q. Who did you see then?

A. Dr. Grossman.

Q. That is in Seattle? A. In Portland.

Q. Did your lawyers send you to him?

A. Yes, sir.

Q. That was about a week after the accident?

A. I think so.

Q. Approximately how many times have you seen a doctor since this accident?

A. Seen Dr. Grossman? [14]

Q. Approximately how many times have you seen doctors altogether since this accident?

A. Oh, probably eight or nine times.

Mr. Morrison: I think that is all.

Redirect Examination

By Mr. Lenske:

Q. How many of those eight or nine times were for therapy treatments, Mr. Smith?

A. Well, the therapy treatments were besides that.

Q. How many therapy treatments did you take?

A. I think seven.

Q. Seven therapy treatments?

A. I think so.

Q. That was in addition to the eight or nine times you visited the doctors? A. Yes, sir.

(Testimony of Floyd Smith.)

Q. Were the therapy treatments by the doctor himself or by a nurse?

A. No, by a therapist in Seattle in conjunction with Dr. Dooley's office. And he prescribed treatment—exercises for me to take.

Q. Who gave the therapy treatments?

A. I don't recall the woman's name that was in charge.

Q. When was the last therapy treatment you took? A. Oh, perhaps six weeks ago. [15]

Mr. Lenske: That is all.

Recross-Examination

By Mr. Morrison:

Q. One other question I neglected. Did I understand you correctly, Mr. Smith, on your direct examination that you were losing traction; in other words, your wheels were skidding when you came to a stop up there? Is that correct?

A. Yes, sir.

Mr. Morrison: That is all.

Mr. Lenske: That is all.

(Witness excused.) [16]

GARY MOORE

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lenske:

Q. What is your full name?

A. Gary Dillon Moore.

Q. How old are you, Gary? A. Twenty.

Q. Where do you live?

A. Roseburg, Oregon.

Q. What do you do?

A. I am a truck driver.

Q. For whom?

A. Mr. Newton Kirschner.

Q. On October 31st, 1955, what was your occupation? A. Truck driver.

Q. For whom?

A. Deschutes Valley Potato Company.

Q. Are you acquainted with any of the defendants in this case? A. No, sir.

Q. Neither Mr. Binder nor Mr. Buck?

A. No, sir; not personally.

Q. Where were you living on October 31st, 1955?

A. Madras, Oregon. [17]

Q. In the afternoon of that day, what were you doing? A. Driving truck.

Q. What kind of a truck?

A. An International.

Q. What type?

(Testimony of Gary Moore.)

A. Ten-wheel flatbed truck.

Q. How long a truck is the one you were driving?
A. About 35 feet over-all length.

Q. In that afternoon from where to where were you driving?

A. From Portland to Redmond.

Q. At that time did your truck have a cargo of any kind?
A. Part of a load.

Q. It was partly loaded?
A. Partly.

Q. What color was your truck?
A. Red.

Q. Did you approach this curve approximately six miles east of Government Camp that afternoon?

A. I did.

Q. Tell the jury what the weather conditions were as you were approaching that curve.

A. It was snowing, and the roads were slick, the sky overcast and the visibility not too good.

Q. Then as you were approaching that curve, did you see anything unusual? [18]

A. Mr. Smith's car was—his wheels were spinning. Other than that nothing unusual, no.

Q. Did you see Mr. Smith stop his car?

A. Yes.

Q. On which side of the road did he bring his car to a stop?
A. On the right-hand side.

Q. Approximately how close to the guardrail? There was a guardrail there, was there not?

A. Yes.

Q. Approximately how close to the guardrail did he stop his car?

A. Oh, between three and four feet, I would say.

(Testimony of Gary Moore.)

Q. Then what did you observe?

A. I seen there was a woman stuck on the left-hand side of the road facing the wrong direction, going the same direction we were going, on the wrong side of the road. She was stuck.

Q. Her car was stopped on the left-hand side of the road?

A. Yes.

Q. How much distance was there between Mr. Smith's car and this lady's car?

A. I would say approximately 25 or 30 feet.

Q. What did you do with your truck at that time?

A. I stopped behind Mr. Smith.

Q. Why did you stop your truck?

A. I was real close to Mr. Smith, and I had a loose tire chain. I was about ready to lose one tire chain on the right-hand side [19] of my truck, and I stopped to take it up, and I didn't think that I should try to go on through there.

Q. I didn't hear the last part.

A. And I didn't think I should try to go on through there.

Q. Why didn't you think you should try to go through there?

A. Oh, it was just close—there was people on both sides of the road. The road was slick. I haven't been a driver too awfully long. I just decided I should stop.

Q. Did you park your truck then?

A. Yes.

Q. Where did you park it?

A. About 15 feet in back of Mr. Smith's.

(Testimony of Gary Moore.)

Q. How far from where Mr. Smith's car was parked could one see Mr. Smith's car while going in the same direction at that particular time and place?

A. Well, I would say 150 or 200 yards, approximately, if they could see him around my truck.

Q. Now, how about the left-hand side of the road? What distance could one see people or cars parked on the left-hand side of the road at that time? A. Approximately the same.

Q. Did anyone else stop their automobile besides yourself?

A. Yes, there was two or three vehicles behind me.

Q. Immediately after you parked?

A. Yes. [20]

Q. Then when you got out of your truck, what did you do?

A. I walked to the left-hand side of the road and began to assist the lady put on her tire chains, the one that was stuck on the wrong side of the road.

Q. While you were so doing, what did you observe?

A. I saw a truck and trailer, a red one, coming from the east going towards Portland, coming down the hill, and about the same time I could see this fellow's tanker coming up the hill, the yellow truck coming up the hill.

Q. So what did you do?

(Testimony of Gary Moore.)

A. I signaled for the red truck coming down the hill to stop.

Q. By the red truck you mean a truck and tanker that was coming west? A. Yes.

Q. At what rate of speed was that truck coming?

A. He was traveling very slow. I don't know what speed it would be.

Q. At what rate of speed was the defendant's truck and trailer going? Was that going at a different rate of speed than the one that was coming?

A. I would say so, a little bit, yes.

Q. At approximately what rate of speed would you say?

A. Oh, 20 miles an hour; maybe 25.

Q. Just what did you do when you saw those two trucks coming, one from one way and one from the other way? [21]

A. I signaled the red truck to stop.

Q. How did you signal it to stop?

A. I just held up my hand.

Q. What else did you do?

A. I signaled for the other one. The other one had stopped.

Q. How did you do that?

A. By waving my hand at him.

Q. Then what happened?

A. I turned and started to help the lady put her chains on again, went back to the job of doing that. That is when Mr. Howard was hit.

Q. You said something happened. What was that? I didn't hear.

(Testimony of Gary Moore.)

A. That is when the accident occurred then.

Q. What occurred?

A. Mr. Smith and Mr. Howard's car was hit by the truck.

Q. Did the truck pass through between the two automobiles and between the people, Mr. Binder's or the defendant's truck? Did the truck itself pass through?

A. Yes.

Q. What happened to the trailer?

A. It appeared to me that the trailer slid, or perhaps the back end of the truck slid, and the trailer hit Mr. Smith's car and it appeared to me hit Mr. Smith and Mr. Howard.

Q. Mr. Moore, were you subpoenaed to come here?

A. Yes. [22]

Q. By whom?

A. American Associated Insurance Company.

Q. I didn't mean that.

Mr. Morrison: I would like to present a question of law to the Court.

The Court: A little later on.

Q. (By Mr. Lenske): Which party, the defendant or the plaintiff, subpoenaed you?

A. I don't know. A lawyer in Roseburg came where I was working and handed me a subpoena and told me to appear here today. He was a local lawyer. I don't know which side he was with.

Q. How did Mr. Smith or anyone on his behalf ascertain who you were as the person who had been driving that particular truck at that time?

A. How did they find me?

(Testimony of Gary Moore.)

Q. Yes.

A. There was an ad in the paper, first in the Bend Bulletin, and then I believe there was one in The Oregonian. I didn't see it myself, but one of the fellows that worked where I did seen it and told me about it. I called Portland, and my next trip in I stopped in and seen this party.

Q. Who was it that you called, or who was it that put the ad in?

A. Spiegel, Spiegel & Lenske.

Mr. Lenske: You may cross-examine. [23]

Cross-Examination

By Mr. Morrison:

Q. You were subpoenaed by a lawyer in Roseburg to come here, weren't you? A. Yes, sir.

Q. And you were subpoenaed to come in here and give testimony for the defendant?

A. Yes, sir.

Q. You were in my office this morning, weren't you? A. Yes, sir.

Q. And I asked you this morning whom you were subpoenaed by and you told me you were subpoenaed by a lawyer in Roseburg, did you not?

A. Yes, sir.

Q. You also told me you were not subpoenaed by the other side? A. No, sir.

Q. Now, isn't it a fact, Mr. Moore, at the scene of this accident that you signaled the red tanker to stop, the one coming towards Portland. That is

(Testimony of Gary Moore.)

correct, isn't it? A. Yes, sir.

Q. And he pulled over and stopped on the right shoulder of the road; isn't that a fact?

A. Yes, sir.

Q. Now, isn't it also a fact that you then turned and signaled this Mr. Buck to go through? [24]

A. I didn't signal Mr. Buck to go through.

Q. Didn't you tell me this morning in my office that you did? A. No.

Q. Do you remember talking to an attorney, Mr. Charles Marsh from Bend, on the 3rd of November? Do you remember giving him a written statement?

A. I gave a written statement at Redmond.

Q. Yes, to Attorney Charles Marsh of Bend?

A. I believe that was his name.

Mr. Morrison: I would like to have that marked and handed to him.

(The statement referred to was thereupon marked Defendants' Exhibit 1 for identification.)

Q. (By Mr. Morrison): Would you look at the last page and see if that is your signature?

A. Yes.

Q. Now would you read that, please. Would you read that statement to yourself. You don't have to read it out loud. Just glance at that statement, and I will ask you to state whether or not you didn't tell him that you waved that other truck through

(Testimony of Gary Moore.)

and you thought there was plenty of room; otherwise you wouldn't have waved him through?

Mr. Lenske: May it please the Court, I object to the question until such time as counsel wants to introduce it so I can get an opportunity to examine it. [25]

The Court: Objection overruled.

Mr. Morrison: I can probably help you by finding that portion of it a little quicker, if the bailiff will hand it to me.

Q. Read Page 3. Didn't you initial each page of that? Look down and see on each page of that whether or not you didn't put your initials on each page of that statement. A. Yes, sir.

Q. Now wasn't that version you gave at that time your opinion of what happened out there on that occasion? A. Yes.

Mr. Morrison: I will ask that be introduced in evidence.

The Court: Admitted.

(The statement referred to was received in evidence as Defendants' Exhibit 1.)

DEFENDANTS' EXHIBIT No. 1

Nov. 3, 1955.

My name is Gary D. Moore, age 20. I live at Redmond, Ore., on Northwest Mkt. Rd. I am married, wife's name is Shirley Moore. We haven't any chil-

dren. I am employed by Deschutes Valley Potato Co., as a truck driver.

On Oct. 31, 1955, about 4:30 p.m., I was returning to Redmond, Ore., I was driving company truck 1950 International flat bed truck. I had a small load, 3 tons on truck.

I came up on an "S" curve on Hiwy. #26 about 7 miles from Gov't Camp, Ore. There was a vehicle on wrong side of road in the beginning of this "S" curve. I was chained up as Hiwy was rather slick with about 2 inch snow pack. It was cloudy and snowing lightly, I had my clearance lights on. I pulled to my extreme right against the snow bank and stopped about 40 to 50 feet to west of this stalled car. I saw on up ahead of me another car in my lane of traffic. This car was on to East a short distance from vehicle on wrong side of Hiwy. This was a Hudson vehicle; it was slipping and sliding as I stopped. As I got out of cab this Hudson slid into snow bank on right side of Hiwy and came to a stop. It's left wheels were about half way on the paved portion of Hiwy. It would have been necessary to go to left side of Hiwy to have passed this vehicle.

I saw that the car on wrong side of Hiwy was driven by a woman alone, it was a 1954 or '55 Chevrolet sedan. I didn't notice license number. I went over to ask if I could help her. She said yes. The driver and another man were starting to put chains on their car (Hudson) also at this time. About this time I saw approaching a yellow tank truck &

trailer coming up grade from the west. I could also see another tanker (red) coming down grade. Both of these tankers were traveling very slowly. These two tanks couldn't see each other due to curve, so I waved the Red Tanker down. I was standing to rear of the Chevrolet on north side of Hiwy. This Red tanker stopped at my signal some distance east of the Chevrolet, on its right side of road near snow (????). There was plenty of room between my truck and the Chevrolet for the yellow tanker to come on through so I waved this tanker on past. The yellow tanker passed the Chevrolet safely.

This rig was about 60 feet long and the truck was about even with the Hudson when trailer was about abreast of Chevrolet. This truck and trailer was having to travel to north of center of Hiwy to miss the Hudson in east lane of traffic. I couldn't see the two men at Hudson while this truck was passing. I don't know just how much clearance the truck had but it appeared to have enough or I wouldn't have waved the driver through. About the time the trailer was abreast of the Hudson I heard a bump and looked up to see what had happened. I saw the trailer straightening up from a slide to right (south) and a man straightening up from in back of Hudson at left rear wheel. He was holding his hip. About that time I saw the other man come out from under the right rear end of trailer. I ran up to scene of accident, the man was laying about on center line of Hiwy on his stomach. We didn't try to move him. The yellow truck came to a stop

within 40 feet. We covered the injured man and sent for help. The slightly injured man stood around for awhile. We helped shovel out his car and turn it around.

I don't believe that the Hudson was moved after accident until the driver was ready to follow ambulance back to Portland, Ore.

The driver of Chevrolet left after I had gone back and helped with her chains. She was a woman about 35 yrs. old. I believe with Oregon license.

I believe accident was caused by slick Hiwy, heavy super on curves and the fact that the tanker truck didn't have chains on. It looked like truck and trailer skidded to right (south) as it passed Hudson. If the truck could have been higher on super probably it wouldn't have skidded but the Chevrolet had the road blocked on that side.

The trailer slid about 3 to 5 feet to right. There were lots of arriving vehicle but I think at time of accident there was only myself, Chevrolet, Hudson and the two tank trucks. The Hudson was about as far to right as possible when the men started to put on their chains. They had slid to right and got out and started to put on their chains. The Hiwy is very wide at this point and had been plowed. It was just one of those unfortunate accidents where if the two men had just stepped out of the way the chances are that there would have been no damage.

I have read the above six page statement. It is true and correct to best of my memory.

/s/ GARY D. MOORE.

(Testimony of Gary Moore.)

Q. (By Mr. Morrison): Then you did tell him that you signaled him through, didn't you?

A. Yes.

Q. Has anybody threatened you with any lawsuit if you testified otherwise here? A. No.

Q. Are you sure about that? A. Yes.

Q. There was a lot of space between these two parked cars, wasn't there?

A. Quite a bit, yes. [26]

Q. And back of this guardrail, Gary, there is a wide space there, is there not, on the right-hand side of the highway, a wide shoulder there? I mean west of that turn.

A. On the right side of the road?

Q. On the right side of the road.

A. On the right side of the road it appeared to me——

Q. I am talking about going east.

A. Yes.

Q. Before you reach the curve? A. Yes.

Q. There is a wide shoulder there on the right side, is there not?

A. It didn't appear that way to me. It appeared that the pavement came close to the guardrail, very close.

Q. That what?

A. It appeared to me that the pavement came very close to the guardrail.

Q. You misunderstood me. I didn't make myself clear, Gary. The paved portion comes very close to the guardrail there, does it not? A. Yes.

(Testimony of Gary Moore.)

Q. Some eight inches, or something like that, from it? A. Yes, I would say.

Q. I didn't make myself clear on that. What I meant, Gary, was that going east before you come to that turn and before you [27] reach the guardrail there is quite a wide space on the right side, isn't there? A. Yes, there is.

Q. And then opposite to where this accident happened, where this truck that you stopped was, the tanker coming from the east, there is a wide shoulder over there to the left, isn't there?

A. Yes, it appeared to be.

Mr. Morrison: I think that is all.

Redirect Examination

By Mr. Lenske:

Q. Mr. Moore, were you asked by Mr. Spiegel to come here and testify for the plaintiff?

A. Yes.

Q. Were you paid anything by Mr. Spiegel or promised anything by Mr. Spiegel? A. No.

Q. Were you paid anything by anyone else?

A. I was given notice that I had reservations in a hotel and I was given \$25 as expense money.

Q. By whom?

A. By the lawyer in Roseburg.

Mr. Lenske: That is all.

Mr. Morrison: That is all.

(Witness excused.) [28]

Mr. Lenske: We will call Kenneth Buck as an adverse witness.

KENNETH BUCK

one of the defendants, was produced as a witness in behalf of plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lenske:

Q. What is your name, sir?

A. Kenneth Buck.

Q. Where do you live?

A. Madras, Oregon.

Q. How old are you? A. Thirty.

Q. By whom are you employed?

A. Kenneth Binder.

Q. In what capacity? What do you do for Mr. Binder? A. Truck driver and farm labor.

Q. How long have you been employed by Mr. Binder? A. Since June the 20th, 1954.

Q. On October 31, 1955, were you driving a truck and trailer for Mr. Binder? A. Yes, sir.

Q. Describe that truck and trailer, please.

A. It is a full truck and trailer, diesel, 60 feet long.

Q. By 60 feet long you mean the combination of the truck and the trailer?

A. Combination length, truck and trailer.

Q. What is the length of the truck and what is the length of the trailer?

A. The truck is 30 feet.

Q. And the trailer is another 30 feet; is that right? A. The trailer is 25.

(Testimony of Kenneth Buck.)

Q. Where is the other 5 feet? Is that in the tongue of the trailer? A. In the tongue, yes.

Q. Is the length of the tongue 5 feet?

A. Approximately.

Q. How is the trailer attached to the truck?

A. With the tongue.

Q. What kind of a hitch?

A. It is, oh, a logging hitch. It has two safety chains or safety cable.

Q. Is the tongue attached to the trailer—is the tongue of the trailer attached to the truck so that the trailer will be rigid and straight with the truck at all times? A. No.

Q. It is not? A. No.

Q. Is it attached so that the trailer will swing from side to side and not be rigidly straight with the truck? [30] A. That is right.

Q. How much of an arc will the rear end of the trailer make?

A. I couldn't say exactly, but it will turn quite sharp.

Q. It will turn quite sharply? A. Yes.

Q. Where there is a grade will the trailer be more apt to swing than if it is on level ground that you are driving at the time?

A. You mean going up a grade?

Q. No, where there is a super on the highway so that the road itself has a grade going from left to right.

A. It will track within six inches of the truck tracks.

(Testimony of Kenneth Buck.)

Q. Pardon?

A. It will track within six inches of the truck tracks. The trailer tracks will track within six inches of the truck tracks.

Q. The trailer tracks are normally within six inches of the truck tracks? A. On a curve, yes.

Q. On a curve? A. On a supered curve.

Q. When going straight ahead how much difference is there? A. It follows straight behind.

Q. The super normally makes only six inches difference?

A. The super doesn't have anything to do with it. The curve [31] does.

Q. The curve does? A. Yes.

Q. It will make a variation of six inches?

A. Approximately.

Q. On October 31, 1955, what happened to the trailer immediately before and at the time that it struck Mr. Smith and Mr. Howard?

A. When I slowed down to go between the cars I was going so slow that it slipped sideways on the slick snow.

Q. Was the road slick and slippery at that time?

A. Evidently.

Q. Did you know that it was?

A. I had no way of knowing how slick.

Q. Did you observe automobiles along the highway there, parked along the highway, or people near the highway? A. I did.

Q. What did you observe?

(Testimony of Kenneth Buck.)

A. Lots of cars and trucks stopped on the scene, and one car and a man by the road on the left-hand side. The rest were on the right off the road, clear off as far as they could get.

Q. How many vehicles did you see?

A. Well, there was three trucks and about three or four cars.

Q. All parked in that particular area at that particular time? A. Yes.

Q. Did you observe Mr. Smith? [32]

A. No.

Q. You didn't see Mr. Smith at all?

A. No, nor his car.

Q. Pardon? A. Nor his car.

Q. You didn't see either him or his automobile at the time that you passed him?

A. I was blinded by these other parked trucks and cars.

Q. I didn't hear you.

A. I was blinded by the other parked trucks and cars.

Q. How far behind his automobile was the nearest truck? A. 150 feet.

Q. During that 150 feet that you were driving you didn't see Mr. Smith?

A. I seen Mr. Smith about 100 feet from——

Q. Again, I didn't hear you.

A. As I got around this truck, why, then I seen Mr. Smith.

Q. As you came around the truck you did see Mr. Smith?

(Testimony of Kenneth Buck.)

A. Yes. There was another car in front of this truck.

Q. Approximately 100 feet away you saw him?

A. Yes.

Q. Where was he and what was he doing at that time?

A. He was kneeling down beside the truck or the car putting on chains, or what appeared to be putting on chains.

Q. Did you see Mr. Howard at that time? [33]

A. I seen two people, yes.

Q. Where was Mr. Howard?

A. He was just right by the wheel, too, just in front of Mr. Smith.

Q. What was he doing at that time?

A. Helping Mr. Smith—appeared to be putting on chains.

Q. Did you see anyone else in and about that area at that time? A. I did.

Q. Whom did you see?

A. I seen Gary Moore and this woman——

Q. Where was the lady?

A. Standing behind her car.

Q. Standing behind what?

A. Behind her car.

Q. Where was Gary Moore?

A. Standing back just a few feet from her.

Q. Now at that time you said you slowed down. When did you slow down?

A. When I first seen the cars and trucks.

Q. How much space was there between Mr.

(Testimony of Kenneth Buck.)

Smith and the closest object on the left-hand side of the road; that is, either a person or an automobile? A. About 15 feet.

Q. When you say about 15 feet you don't mean exactly 15 feet [34] do you?

A. I mean about 15 feet.

Q. It might have been 16 feet? A. Right.

Q. Might have been up to 20 feet?

A. Possibly.

Q. Now, did you have any cause to believe that your trailer would sway at that time and place as you went through that area?

A. I did not.

Q. What caused it to sway?

A. On the super, going too slow on the slick super.

Q. Because you were going too slow at that particular time? A. That is right.

Q. If you were going faster, would you have been able to avoid the swaying of the trailer?

A. I would have.

Q. Were you in a position to stop at that particular time? A. I was.

Q. Then you could have brought your truck and trailer to a stop before passing Mr. Smith at that time and place? A. Yes.

Mr. Lenske: That is all.

(Testimony of Kenneth Buck.)

Cross-Examination

By Mr. Morrison:

Q. Why didn't you stop? [35]

A. The road was too slick, and on that steep super I would have slid down the grade into all these cars.

Q. Into all those cars? A. Yes, sir.

Q. But I mean when you came up there at first were you planning to stop?

A. I had started to stop, yes.

Q. Then why didn't you stop?

A. Because Gary Moore waved me on.

Q. He waved you through? A. Yes.

Q. When you went by this other vehicle, or between those two vehicles, about how fast would you say you were going?

A. About 15 to 18 miles an hour.

Mr. Morrison: That is all, your Honor.

Redirect Examination

By Mr. Lenske:

Q. Mr. Buck, you say that you could have stopped, and you mentioned you could not have stopped without striking an automobile at that time.

A. I could have stopped, yes, but the truck after stopping would slide down the super.

Q. In other words, you couldn't have stopped without striking either an automobile or a person in the situation as it existed [36] at that time?

(Testimony of Kenneth Buck.)

A. That is right.

Q. When did you find out that that was the situation?

A. When I seen Mr. Howard's car and him and Smith, or Mr. Smith's car, whichever it was. When I seen them it was too late to try to stop for fear of sliding into somebody else.

Q. Was it the slippery condition of the road at that time that would have made it difficult for you to stop without hitting a truck or an automobile? A. Yes, sir.

Q. When did you first observe that slippery condition of the road?

A. When I seen cars sliding all over the road.

Q. How far back were you when you first saw that? A. About 300 feet.

Q. Could you have stopped at that time?

A. I could have.

Q. Without striking anything?

A. I could have.

Q. Or anybody? A. Yes.

Q. Did you have chains on at that time?

A. No.

Mr. Lenske: That is all. [37]

Recross-Examination

By Mr. Morrison:

Q. Had you up until the time of this accident slipped or lost traction at all? A. Never.

(Testimony of Kenneth Buck.)

Q. About how far back from there had it started to snow?

A. It was at Zigzag. That is about 36 miles, I believe.

Q. When you first came up onto this scene, seeing those trucks, you planned then to stop until you were waved through? A. I did.

Mr. Lenske: That is objected to as leading, your Honor.

The Court: This is Cross-examination.

A. I did.

Mr. Morrison: That is all.

Redirect Examination

By Mr. Lenske:

Q. Mr. Buck, you didn't observe the slippery condition of the road until you saw all those cars parked and the people in the road. Do I understand that to be your testimony?

A. That is right.

Q. Was the road as slippery immediately before that 300 feet as it was after that 300 feet?

A. I never tested it.

Q. You didn't intend to stop and put your chains on at that [38] time, did you?

A. Not until I felt that they was needed.

Q. You didn't feel that they were needed at that time? A. No.

Q. Did you have a load on your truck?

A. No, I was empty.

(Testimony of Kenneth Buck.)

Q. Was your trailer empty, too?

A. Yes.

Q. What is the weight of your truck and what is the weight of your trailer when empty?

A. The truck weighs about 17,000, and the trailer weighs about 10,000. Excuse me. The truck weighs 21,000.

Q. The truck weighed at that time 21,000 pounds?

A. Approximately, yes.

Q. And the trailer weighed how many thousand pounds?

A. About 10,000 pounds.

Q. Or a total of 31,000 pounds empty; is that right?

A. Yes.

Q. Now, will the trailer sway or slide more readily when it is empty or less readily when it is empty as against when it has a cargo?

A. It never sways except when there is something to cause it to sway.

Q. What caused it to sway in this instance?

A. It didn't sway. It slid. [39]

Q. What caused it to slide in this instance?

A. Gravity. It slide down the hill.

Q. How long a distance did it slide?

A. About five to six feet.

Q. A total of five to six feet at the outside or the inside?

A. It slid down the hill about five feet.

Q. At the widest part of the arc?

A. Yes.

Q. What part of your trailer slid first?

A. The front.

(Testimony of Kenneth Buck.)

Q. Then what happened?

A. Then when it straightened out the back end slid.

Q. Which part of the trailer struck Mr. Smith and Mr. Howard? A. The rear.

Q. Now, as I understand it, you say it slid on account of gravity?

A. It slid on account of it was on a hill and on the super.

Q. Because it was on the super?

A. It was slick, yes.

Q. Because of the grade going right to left?

A. That is right.

Q. On that particular highway at that time?

A. Yes.

Q. Now were you aware of such a grade before you tried to pass through? [40] A. Yes.

Mr. Lenske: That is all.

Mr. Morrison: That is all.

(Witness excused.)

(Thereupon, a recess was taken until 1:30 o'clock p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Lenske: If the Court please, we have two additional witnesses in our principal case. They are both doctors. We requested that they be here at 1:30, but we have been advised that they won't be able to get here until around 2:00 o'clock.

The Court: Do you expect to make a motion on liability?

Mr. Morrison: Yes, your Honor.

The Court: I will hear you now. You rest your case on liability?

Mr. Lenske: Yes.

Mr. Morrison: May it please the Court, at this time the defendant moves the Court for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right of relief. In support of this motion we contend that the plaintiff's testimony affirmatively shows that he was guilty of contributory negligence as a matter of law, first in placing himself in a position of peril and remaining there and, second, in failing [41] to keep a proper lookout. And on the third ground that he assumed the risk of the attending danger.

(The motion was argued to the Court by counsel.)

The Court: I don't see any negligence in the case. The motion to dismiss will be allowed on that ground.

Ladies and gentlemen you are now discharged from further consideration of the case.

(Whereupon, proceedings in the above cause were concluded.) [42]

Reporter's Certificate

I, John S. Beckwith, an Official Court Reporter of the above-entitled Court, hereby certify that I

reported in shorthand the testimony and proceedings had upon the trial of the above-entitled cause on May 22, 1956, before Honorable Claude McCulloch, Chief Judge; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, and the foregoing transcript, pages 1 to 42, both inclusive, constitutes a full, true and correct transcript of the testimony adduced upon the trial of said cause, and of the whole thereof.

Witness my hand this 20th day of July, 1956.

/s/ JOHN S. BECKWITH,
Official Court Reporter. [43]

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Jan. 11—Filed complaint.

Jan. 11—Issued summons—to marshal.

Feb. 15—Filed summons.

Feb. 17—Filed motion for order appointing E. E. Dent to serve process in Jefferson County.

Feb. 17—Entered and filed order appointing E. E. Dent to serve process in Jefferson County.

Feb. 17—Mailed summons to E. E. Dent, Madras, Ore., for service.

Feb. 21—Filed summons with return.

Feb. 24—Filed answer.

Feb. 24—Filed demand of defendants for jury trial.

Feb. 28—Filed reply.

- Mar. 19—Entered order setting for pretrial conference on April 16, 1956.
- Apr. 16—Entered Order setting for trial on May 22nd, 1956.
- May 2—Filed depositions of Floyd Smith and Kenneth Buck.
- May 15—Issued 2 subpoenas—8 copies—to defendants' attorneys.
- May 22—Filed and entered Pretrial Order.
- May 22—Record of trial before jury.
- May 22—Motion of defendant for Order of Dismissal.
- May 22—Entered Order Allowing Dismissal.
- May 24—Filed and entered Order of Dismissal.
- May 31—Filed motion for new trial and to set aside judgment of dismissal.
- June 22—Entered Order setting Motion for New Trial for July 6th.
- Aug. 8—Entered Order Setting Motion for New Trial for August 13th.
- Aug. 13—Record of hearing on motion for new trial denied.
- Aug. 30—Filed and entered order denying motion for new trial.
- Sept. 11—Filed notice of appeal.
- Sept. 11—Filed designated of record on appeal.
- Sept. 12—Filed 2 copies transcript of proceedings
- Sept. 11—Filed 2 copies transcript of proceedings of May 22, 1956.
- Sept. 24—Filed and entered order to transmit exhibits to Circuit Court of Appeals.
- Sept. 24—Filed motion directing Clerk to transmit exhibits to Circuit Court of Appeals.

In the United States District Court
for the District of Oregon

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, R. DeMott, Cleark of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Pretrial order, Order of dismissal, Motion requesting order of dismissal be set aside and new trial ordered, Order denying motion, Notice of appeal, Undertaking on appeal, Designation of record on appeal, Order to forward exhibit to Court of Appeals and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8421 in which Floyd Smith is the plaintiff and appellant and Kenneth Buck and Kenneth Binder are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, May 22, 1956, and Exhibit No. 1.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 2nd day of October, 1956.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15323. United States Court of Appeals for the Ninth Circuit. Floyd Smith, Appellant, vs. Kenneth Buck and Kenneth Binder, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: October 3, 1956.

Docketed: October 10, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15323

FLOYD SMITH,

Plaintiff-Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendant-Respondent.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes now Appellant and makes his statement of the points upon which he intends to rely in the within-entitled appeal and his designation of record as follows:

Statement of Points

The Court erred in dismissing plaintiff's case in that there was sufficient evidence of defendants' negligence to require that said issue be submitted to the jury for the jury's determination.

Designation of Record

Appellant designates as material to the consideration of this appeal, the Pretrial Order entered in said cause and the entire transcript of the testimony and evidence adduced at said cause together with the exhibit introduced therein as documentary evidence.

/s/ DAVID M. SPIEGEL,

Of Attorneys for Plaintiff-
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed October 10, 1956.



No. 15323

**United States
Court of Appeals
For the Ninth Circuit**

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Appellees.

Appellant's Brief

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FILED

FEB 11 1957

PAUL P. O'BRIEN, CLERK



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Blashfield Cyclopedia of Automobile Law, Vol. 1, Sec. 749	5
Blashfield Cyclopedia of Automobile Law, Vol. 2, Sec. 827	5, 11



**United States
Court of Appeals
For the Ninth Circuit**

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Appellees.

Appellant's Brief

**Appeal from the United States District Court for the
District of Oregon
JURISDICTION**

Appellant is a citizen of the State of Washington
and appellees are the citizens of the State of Oregon.
(Tr. of R. p. 4)

The cause of action is one for personal injury and
the amount of damage claimed exceeds the sum of
\$3,000.00 exclusive of interest and costs. (Tr. of R.
p. 4)

The United States District Court had jurisdiction in this cause by virtue of Title 28, Sec. 1332, Subsection (a), (1), which reads as follows:

“(a) The District Court shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of \$3,000.00 exclusive of interest and costs, and is between:

(1) Citizens of different states:”

This Court has appellate jurisdiction by virtue of Title 28, Sec. 1291 U. S. C. A., which reads as follows:

“This court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ”

STATEMENT OF THE CASE

Appellant brought action for personal injuries sustained when struck by a trailer being pulled by a truck owned by appellee Binder and driven by appellee Buck.

At the conclusion of appellant's case in brief, the court dismissed appellant's cause and the jury upon the ground that no negligence had been shown. (Tr. of R. p. 52)

The accident occurred on October 31, 1955 in the State of Oregon on U.S. Highway No. 26 approximately six miles east of the town of Government Camp on the slopes of Mt. Hood. (Tr. of R. p. 4)

It was snowing and the road was slick. (Tr. of R. p. 16) Plaintiff had been driving east in his passenger

automobile when he could proceed no further because of lack of traction. He brought his car to a halt within three or four feet of the steel guard rail upon his side of the road and was engaged in putting a chain upon the left rear wheel of his vehicle when he heard the roar of a truck, jumped to his feet and was struck by defendant's trailer. (Tr. of R. p. 16, 18, p. 28)

At the place where the accident occurred the road-bed was deeply banked down towards plaintiff. (Tr. of R. p. 51) Directly across the road from plaintiff, at a distance of approximately 15 feet according to appellee Buck (Tr. of R. p. 46) and 30 to 40 feet according to the appellant, (Tr. of R. p. 20) there was another similarly disabled passenger automobile. There were also a number of other vehicles stopped and stalled in the immediate vicinity upon either side of the road. (Tr. of R. p. 44)

Appellee Buck was likewise traveling east. He was driving a Frehoff truck and trailer unit used for the handling of wheat of an overall length of 60 feet. (Tr. of R. p. 41) He attempted to negotiate the passage between appellant and the vehicle across from him, passing his truck within five or six feet of appellant. (Tr. of R. p. 50) Appellant was struck and injured by appellee's trailer when the rear thereof slid sideways down the intervening distance as it passed him. (Tr. of R. p. 43)

SPECIFICATION OF ERROR No. 1

The Court erred in dismissing plaintiff's cause and the jury.

SUMMARY

The trial court ruled that as a matter of law appellees were not negligent. For the purpose of this appeal appellant need only establish that there was sufficient evidence submitted to support a jury verdict in his favor. The Argument sets forth this evidence, together with analogous cases.

FIRST POINT AND AUTHORITIES

There was sufficient evidence of appellee's negligence to require that appellant's cause be submitted to the jury.

Deyo v. Detroit Creamery Co., 257 Mich. 77; 241 N. W. 244,

Thomas v. Shippers Express & Warehouse, 158 Southern 859,

W. W. Pickle & Canning Co. v. Baskin, 236 Ala. 168; 181 Southern 765,

Commercial Carriers v. Small, 277 Ky. 189; 126 S. W. 2d 143,

White v. Kretz Bros., 172 Cal. App. 2d 197; 10 P. 2d 198,

Cook v. Miller Transportation Co., Inc., 319 Pa. 85; 179 At. 429,

Blashfield, Cyclopedia of Automobile Law, Vol. 2,
Sec. 827,

Blashfield, Cyclopedia of Automobile Law, Vol. 1,
Sec. 749.

ARGUMENT

Appellee Buck was traveling into a mountainous area on the last day of the month of October. It had been snowing for the past 36 miles as he had been traveling to the height at which the accident occurred. (Tr. of R. p. 49) Three hundred feet prior to the accident, he was aware of traffic congestion caused by the slickness of the road. (Tr. of R. p. 48) He continued to travel over a curved road so congested with stalled vehicles that he could not see appellant until he was within 100 feet of him. (Tr. of R. p. 44) He viewed the space between appellant and the vehicle across the road from him as approximately 15 feet. (Tr. of R. p. 46) He was traveling between 15 to 18 miles per hour according to his own testimony (Tr. of R. p. 47); 20 to 25 miles per hour according to the witness Moore. (Tr. of R. p. 31) He had no chains on. (Tr. of R. p. 48). He was aware of the steep grade of the bank of the road from his left to right down towards appellant before he attempted to pass between appellant and the car across from him. (Tr. of R. p. 51) He was aware that his trailer was so attached as to permit it to swing from right to left. (Tr. of R. p. 42) He started to pass between appel-

lant and the car across from his at a distance of only five feet away from appellant. (Tr. of R. p. 50) He could have stopped before he attempted the passage. (Tr. of R. p. 48) The accident occurred, in his own words, when his trailer slid down the "super" by gravity. (Tr. of R. p. 50) It would not have so slid, he testified, if he had been going faster. (Tr. of R. p. 46) There was no testimony that at any time he sounded his horn.

Reduced to simple statement: appellee Buck failed to maintain control of his trailer. With reason to anticipate this, he gave himself but a margin of five feet in the initial instance by which to avoid injury.

In **Deyo v. Detroit Creamery Co.**, 257 Mich. 77; (241 N. W. 244), defendant's truck, hauling two trailers, was being driven upon an icy street so "crowned" as to be two inches higher in the center than at the curb. Plaintiff, a small boy, stepped off of the curb and in this position stopped to wait for defendant's truck and trailers, that were approaching from his left, to pass. There was an automobile parked at the curb approximately 20 feet to the boy's right. The truck turned to avoid the car and the second trailer being hauled skidded into the boy.

The Court states at page 83:

"A driver may be negligent in driving at a rate of speed not in excess of the limit fixed by statute . . .

Defendant further claims that the mere skidding of the trailer does not constitute negligence. It became a question for the jury to determine whether defendant's driver drove in a safe manner on a crowned road covered with ice, and also whether he made a sudden turn of the truck so as to cause the trailer to skid and injure plaintiff. It did not require expert testimony to show what is in everyone's knowledge: that one is apt to slide or skid on a slippery pavement and particularly so when making a sharp turn with a vehicle. The testimony does not show that a skidding was unpreventable . . . The facts in the case presented a question for the jury, and the verdict is supported by proper testimony."

In **W. W. Pickle & Canning Co. v. Baskin**, 236 Ala. 168; (181 S. 765) plaintiff's intestate was walking on a path beside the road in the same direction as defendant's truck and trailer was traveling. A similarly large size vehicle was coming towards them. When approximately 50 to 70 feet from the decedent, defendant pulled his truck to the right to pass the oncoming vehicle. After he had done so he pulled back towards the center of the road. In the course of this latter movement, the trailer swerved out of line and struck and killed plaintiff's decedent.

The Court states as follows upon page 170:

"... we conclude from the record that it is a reasonable explanation of the accident that plaintiff's intestate was struck by the trailer, which doubtless

swerved to some extent, as the driver righted the truck upon the road after thus passing the other truck."

". . . The jury were authorized to find from the evidence that the driver of the truck was negligent in driving in such close proximity to plaintiff's intestate, and in not taking proper precautions to avoid striking him with any part of the truck or trailer and that he was likewise guilty of negligence in admittedly failing to give him any warning of the approach of the truck."

In **Cook v. Miller Transportation Co. Inc.**, 319 Pa. 85; (179 Atlantic 429), defendants were driving their truck and trailer down an icy, slushy street towards an intersection. Plaintiff was a boy standing some four feet from the curb, who had stepped out from the sidewalk and had then stopped to wait for the truck and trailer to pass. To avoid a vehicle approaching from its left, the truck swerved to the right passing between approximately five feet of the boy. The rear wheels of the trailer "either swerved or skidded" towards the latter and ran over his foot.

The Court quotes with approval from the opinion of the trial court upon page 87 as follows:

". . . 'The jury would be fully justified in finding that the driver of defendants' truck was negligent. The minor plaintiff was in full sight under an electric light . . . To drive a 35-foot trailer-truck at 28 to 30 miles an hour on a slippery street in

close proximity to a standing child, with a resulting swerve or skid so that the child is injured, may well be deemed negligence.' "

As the cases hereinabove cited, as well as the cases to be cited hereafter, illustrate, the fact that defendant is pulling a trailer is a distinguishing feature. Its free swinging hitch gives it road characteristics differing from those of an automobile or truck; characteristics that must be considered by the driver if he is to exercise due care in maintaining control of it.

In **White v. Kretz Bros.**, 122 Cal. App. 197 (10 P. 2nd 198), a truck and trailer being driven by the defendant in the center of the road approached plaintiff's vehicle traveling in the opposite direction. The driver of the truck and trailer swerved his truck to the right which caused the trailer to whip further over to the left. The Court states upon page 200:

"A statement of these facts is sufficient to demonstrate negligence of appellants, which was the proximate cause of the accident, and the lack of contributory negligence on the part of respondents."

In **Commercial Carriers v. Small**, 277 Ky. 189; (126 S. W. 2d 143), the automobile in which plaintiff was riding, and defendants' truck and trailer, each approached a bridge, 16 feet wide between the curbing, from opposite ends. The defendant's truck proceeded

first and swinging to the center of the road, crossed over the bridge. In swinging back to the right hand side of the road at the far end, the trailer swung to the left, hitting the car in which plaintiff was riding.

The Court states upon page 193:

"While the general standard of diligence of a driver of an automobile is always said to be ordinary care, one driving a large machine eight feet wide—nearly 3 feet wider than the usual passenger car—must take that fact into consideration as he endeavors to exercise ordinary care in its operation."

In **Thomas v. Shippers Express & Warehouse Co., Inc.**, 158 So. 859 (La.), plaintiff was walking along the right hand side of a ramp leading up to a bridge and defendant's truck and trailer were coming off the bridge towards him. The truck swerved to the right and a "side motion" was given to the trailer, causing the rear wheels to fall into a hole in the road casing the trailer in turn to jolt off the road into plaintiff.

The Court states upon page 869:

"Plaintiff was where he had a right to be . . . The trailer attached to defendant's truck were unloaded and, consequently, much more given to side sway than if heavily loaded with bales of cotton."

". . . We conclude, therefore, that the injury was caused solely by the negligence of defendant's

employee in improperly handling his vehicle under the circumstances, by permitting the second trailer to swerve off the road and on to the gravel path, thus causing the injury complained of."

In **Blashfield, Cyclopedia of Automobile Law and Practice**, Sec. 749 p. 480, Vol. 1, part 2, states as follows:

"It is frequently said that the mere skidding of an automobile, alone and unexplained, does not import, indicate, or establish negligence, and furnishes no evidence in driving at an excessive speed . . ."

"The fact, however, that the automobile skidded is not necessarily any defense to the motorist.

"Taken together with acts or omissions of the motorist, skidding may occur in such circumstances as to warrant a finding of negligence. 'Nineteen out of twenty skids' it has been said, 'could have been avoided if the driver had used better judgment.' If it may be found that due care would have avoided the skidding, the motorist's liability follows . . ."

The same author, Volume 2, Sec. 827, page 11, states:

"Chains. The absence of chains, at the time of an automobile accident through skidding, may constitute actionable negligence, although ordinarily the mere failure to have chains will not be negligence as a matter of law.

"In any event, a motorist, in operating his machine without chains on a slippery street, in determining what is a proper rate of speed for him to go, must consider that he cannot stop as quickly without chains as with."

Appellant will not belabor the point. Based upon the foregoing authority appellant contends that it cannot be said as a matter of law that appellees drove this truck and trailer with due care.

Given the facts at hand, the road congested with stalled vehicles, the trailer free to swing, the steep slope down towards appellant, the small space between appellant and the truck to start with, a jury could and should find that appellant's injury was foreseeable and avoidable and due to appellee's negligence.

Respectfully submitted,

/s/ DAVID M. SPIEGEL,

Attorney for Appellant.

**United States
Court of Appeals**
For the Ninth Circuit

FLOYD SMITH,
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vs.

KENNETH BUCK and KENNETH BINDER,
Appellees.

Appellers' Brief

Appeal from the United States District Court
for the District of Oregon

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United States
Court of Appeals

For the Ninth Circuit

FLOYD SMITH,
Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,
Appellees.

Appellees' Brief

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

Plaintiff* brought this action to recover damages for personal injuries suffered as a result of the alleged negligence of defendants*. Plaintiff had stopped his car on the pavement of a snowy highway, and he and his passenger were putting chains on the rear wheels of his car, when he was struck by the trailer of defendants which was attempting to drive past him.

* Plaintiff-appellant is referred to throughout for clarity as "plaintiff". Defendant-appellee Binder, the owner of the truck, and defendant-appellee Buck, his agent, are referred to throughout as "defendants". Defendant Buck was the only one of the defendants actually present at the time of the accident.

At the close of plaintiff's testimony on liability, defendants moved for a dismissal upon the ground that plaintiff's testimony affirmatively showed him to have been guilty of contributory negligence and to have assumed the risk of the danger attending his position. The trial court granted the motion on the ground that defendant had been guilty of no negligence.

Plaintiff has appealed, arguing only the point that there was sufficient evidence of the negligence of defendants to require that the case be submitted to the jury. Defendants not only contend that there was no sufficient evidence of such negligence, but that their motion was well-taken upon the ground that plaintiff was as a matter of law guilty of contributory negligence, and that he had assumed the risk.

STATEMENT OF FACTS

The accident in question occurred on U.S. Highway No. 26, approximately six miles east of Government Camp, Oregon. It was snowing, and the road was slick (R. 16). Plaintiff was proceeding east (R. 14-15). At about 4 p.m., plaintiff's car lost traction (R. 16), and he parked it about two to four feet from the guardrail (R. 16-17) for the purpose of putting on chains. He could have parked it closer to the guardrail, but he would not have had room to work on the right hand chain (R. 17). The guardrail was within a few inches of the pavement at that point (R. 39-40). Immediately west of that point there was

a wide shoulder on the plaintiff's right hand side, and across the highway from where he parked was another wide shoulder (R. 40). After plaintiff parked, a woman going in the same direction as plaintiff pulled off the highway into this latter space (R. 22-23).

Plaintiff and his passenger were engaged in putting on the chains, plaintiff working on the left wheel and the passenger on the right wheel (R. 18). Plaintiff was lying down right up close to his automobile (R. 19). Defendants' truck and trailer, a 60 foot, 31,000 pound rig (R. 41, 50), came from behind plaintiff. Another truck driver, who had parked behind plaintiff (R. 29) was helping the woman across the highway put on her chains (R. 30) when he noticed two trucks coming from opposite directions (R. 30). He signaled the other one to stop (R. 31), and signaled defendant's truck to come through (R. 31, 39). Defendants' truck, which had been approaching at about 20 to 25 miles an hour (R. 31), attempted to go through the gap and as he was passing plaintiff, the trailer slid down and hit plaintiff and his passenger (R. 32). The truck and trailer were immediately brought to a stop ten to twelve feet further on (R. 19).

At the point of the accident, plaintiff was parked just past the center of a curve (R. 24). The road at that point was steeply banked down toward plaintiff (R. 51). The gap between the woman who was

off the road and plaintiff was variously estimated from 15 feet by defendant (R. 46) to 30 to 40 feet by plaintiff (R. 20).

Defendant testified as an adverse witness (R. 40) that the trailer slid sideways because "When I slowed down to go between the cars I was going so slow that it slipped sideways on the slick snow." (R. 43). He did not see plaintiff's car till he got around the truck parked 150 feet behind it (R. 44). If he had stopped, he would have slid down the grade of the highway into the parked cars (R. 47). He had planned to stop when he first saw all the parked cars, but proceeded when he was waved through (R. 47). Prior to reaching that spot he had not felt he needed any chains (R. 49).

SUMMARY OF ARGUMENT

A. Plaintiff was Guilty of Contributory Negligence and Assumed the Risk of his Position.

Despite the fact that this was not the ground of the trial court's ruling, the point, having been seasonably presented to the trial court, may be urged upon this appeal.

Plaintiff was guilty of negligence in parking on the paved portion of the highway. Since there were other areas immediately available where it would have been practicable to pull completely off the highway, plaintiff had the burden of proving that his car was disabled within the meaning of the Oregon

statute. There is no evidence to this effect, and therefore plaintiff's violation of the statute in parking on the pavement is unexcused. His negligence in this regard was clearly a proximate cause of the accident.

Plaintiff was also negligent in attempting to put on chains under the circumstances without taking any precautions for his own safety. There is no evidence that he kept any lookout or asked his passenger to do so. The evidence is that he was not even aware of the approach of defendants' truck and trailer until they were alongside him. Even if he had not been negligent in parking the car where he did, his failure to exercise any precautions while changing the tire was negligence which contributed to his injury.

Furthermore, the risk of his situation being obvious and apparent, and plaintiff having been injured from a danger incident to the risk he must have realized, he assumed such risk, and was not entitled to recover when a vehicle slid down the banked highway and injured him.

B. There Was no Evidence of Negligence on the Part of Defendants.

Mere skidding or slipping on ice or snow is not in itself negligence or evidence thereof. Plaintiff must establish that such slipping was caused by an act of negligence on the part of defendant. In this case, it is established that defendant was attempting to nego-

tiate the dangerous situation created by plaintiff and the other parked cars, at a reasonable speed, under control, and with due care. In fact, the only evidence of the reason for the trailer slipping is the slowness of the speed at which defendant was required to drive by reason of the dangerous situation confronting him. The trial court was correct in holding that there was no evidence that defendants had been guilty of any negligence.

ARGUMENT

A. Plaintiff, As a Matter of Law, Was Guilty of Contributory Negligence, and Assumed the Risk of His Position.

1. The Issue of Contributory Negligence May Be Raised Upon This Appeal.

Defendants' motion for a dismissal was based upon contributory negligence and assumption of risk (R. 52). The trial court, however, ordered a dismissal upon the ground that defendants were guilty of no negligence (R. 52). Upon this appeal, plaintiff has chosen to specify and to argue in his Appellant's Brief only the issue of defendants' negligence (Appellant's Br. 4).

Since an appellate court may affirm a judgment of the court below upon any ground seasonably urged by the appellee in that court, even though that ground is not the basis of the trial court's decision, the issue of contributory negligence is still available

to defendants upon this appeal, despite the trial court's failure to rule upon this aspect of the case. *Commissioner v. Stimson Mill Co.*, 137 F. 2d 286, 287 (CCA 9, 1943). It is the position of defendants that their motion for dismissal was well-taken upon the grounds therein stated, and that the judgment of the court below should be affirmed upon this ground as well as upon the ground stated by the court.

2. *The Plaintiff Was Guilty of Contributory Negligence in Parking His Vehicle Upon the Paved Portion of the Highway.*

The Oregon statute applicable to this situation is ORS 483.320, which reads, in relevant part, as follows:

“(1) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved, improved or main traveled portion of any highway, outside a business or residence district, when it is practicable to park or leave such vehicle standing off such portion of the highway; and in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than 16 feet upon the main traveled portion of the highway opposite such standing vehicle is left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon the highway.

“(2) ★ ★ ★ ★ ★

“(3) This section does not apply to the driver of any vehicle which is disabled while on the paved, improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving the vehicle in such position
* * *

It is undisputed that the plaintiff herein parked on the paved portion of the highway. He testified upon direct examination that he parked two to four feet from the guardrail (R. 17), so as to leave space to put a chain on the right rear wheel. Plaintiff's witness Moore testified that the pavement came up to within about eight inches of the guardrail at that point (R. 39-40).

It was also undisputed that there was a wide space on plaintiff's right hand side of the road traveling east immediately before plaintiff reached the guardrail (R. 40), and that on the left hand side of the highway, immediately across from where plaintiff parked, there was another wide shoulder (R. 40). After plaintiff had stopped, a lady parked a car off the highway in the wide space opposite where he had parked (R. 22-23).

Since it is established that plaintiff parked upon the main traveled portion of the highway, and that there was a place immediately across the highway where it was practicable to park the vehicle, plaintiff was guilty of negligence unless he has met the bur-

den of showing that he was entitled to the benefit of the exception relating to disabled vehicles contained in subsection (3) of the statute. As stated in *Watt v. Associated Oil Co.*, 123 Or. 50, 260 P. 1012 (1927) of the earlier and analogous Oregon statute on this subject, in a case in which the defendant was charged with negligence in violating that statute:

“One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed in the statute.”

This holding is in accord with the substantial weight of authority. See Ann. 131 ALR 562, cases cited in Sect. VII, p. 603.

The evidence of plaintiff completely fails to establish that he could not have driven his car across the highway to the safe shoulder on the other side. If anything, the only inference that can be drawn from his testimony is that he could have moved his car further, but at best the question is left in a completely speculative condition. Plaintiff states in his Brief (p. 3) that he “could proceed no further,” but the evidence fails to bear this out.

Plaintiff testified, on direct examination (R. 16):

“Q. For what reason did you park your car? Why did you stop it or park it?

A. To put my chains on.

Q. What necessity was there for chains at that time and place?

A. I lost traction.”

Plaintiff’s witness Moore testified, also on direct examination (R. 28):

“Q. Then as you were approaching that curve, did you see anything unusual?

A. Mr. Smith’s car was—his wheels were spinning. Other than that nothing unusual, no.

Q. Did you see Mr. Smith stop his car?

A. Yes.

Q. On which side of the road did he bring his car to a stop?

A. On the right-hand side.”

It is common knowledge that a car’s wheels may be spinning and that it may have lost traction, without being totally unable to move. No witness testified that plaintiff was “stuck,” a word that witness Moore used to describe the condition of the woman parked across the road (R. 29). At the very best, the foregoing testimony leaves totally in doubt the vital ques-

tion as to whether the plaintiff could have driven his car across the highway.

Other questions and answers addressed to plaintiff, although again not entirely clear, leave a definite impression that his car was still able to move, despite having "lost traction." Thus, still on direct examination, plaintiff testified (R. 17):

"Q. Were you able at that time and place to bring your car any closer to the guardrail than you did?

A. *I probably could have*, but I wouldn't have had room to have worked on the chain to get it on."

"Q. Now, would you have had control of your car *if you continued to drive it at that time and place* without putting chains on?

A. No, sir." (All emphasis supplied).

It appears from this testimony as if plaintiff's car was still able to move, although he would not have had control of it if he had attempted to proceed further.

In any event, the most that plaintiff can claim for the foregoing testimony is that the question of whether or not he was in a position to proceed further is left completely in doubt. It is entirely a matter of speculation and surmise whether he was entitled to the benefit of the proviso of the statute re-

lating to disabled cars. This being the case, it is axiomatic, both in the Oregon^{*} and Federal^{**} courts, that the evidence is not sufficient to support a verdict. See, e.g., *Moore v. Chesapeake & Ohio R. Co.*, 340 U.S. 573, 578, 71 S. Ct. 428, 430, 95 L. Ed. 547 (1951), wherein the Supreme Court stated that, "Speculation cannot supply the place of proof."

Moreover, this Court has pointed out that, "Courts may not find facts from speculation, no matter how difficult or impossible it may be to produce evidence establishing the fact in dispute." *Controller of California v. Lockwood*, 193 F. 2d 169, 172 (C.A. 9, 1951). How much more so is this the case when plaintiff himself could have given direct testimony on the fact in issue, and no one else was in as good a position to obtain the information. If plaintiff wished to establish that he "could proceed no further," he should have so stated on the witness-stand. The evidence which he did produce leaves the question completely up in the air.

The statute in question and its predecessors have been before the Oregon courts many times. It is well-established that a car is disabled when it cannot

* *Lemons v. Holland*, 205 Or. 163, 193, 284, P. 2d 1041, 286 P. 2d 656 (1955); *Whelpley v. Frye*, 199 Or. 530, 538, 263 P. 2d 295 (1953); *Quetschke v. Peterson*, 198 Or. 598, 610, 258 P. 2d 128 (1953); *Crosby v. Braley & Graham*, 171 Or. 72, 134 P. 2d 110 (1943).

** *Woods v. N.Y. Central R.R. Co.*, 222 F. 2d 551, 552 (C.A. 6, 1955); *Buford v. Cleveland & B. Steamship Co.*, 192 F. 2d 196, 199 (C.A. 7, 1951); *Baltimore v. Louisville & N. R. Co.*, 146 F. 2d 358, 360 (C.A. 4, 1944).

safely be moved to a place of safety under its own power. *Shelton v. Lowell*, 196 Or. 430, 437-438, 249 P. 2d 958 (1952); *Morris v. Fitzwater*, 187 Or. 191, 210 P. 2d 104 (1949). The cases have arisen in a variety of situations, and it is not necessary to discuss each of them, but we will attempt to indicate the line of authority.

The leading case on the subject is *Dare v. Boss*, 111 Or. 190, 224 P. 646 (1924). Plaintiff was injured when repairing a flat tire. He had pulled his car "as far off the road as appeared safe," and only 18 to 20 inches thereof remained on the hard surface. It would have been dangerous to drive further. There is no indication in the opinion that there was any safer place immediately available. The Court held that plaintiff's contributory negligence was a question for the jury. The Court stated the rule as follows:

"Neither do we understand this statute to require a person to incur any chances of any serious injury by removal of a disabled car; but in such case, *if the testimony indicates that such removal would incur danger to the person occupying the car*, there is no hard and fast rule requiring him to take such chance. The 'rule of reason' applies here, and *if it should have appeared to the jury that he could have moved the car safely he would have been guilty of contributory negligence in failing to do so . . .*" (Emphasis supplied).

In *O'Brien v. Royce*, 111 Or. 488, 227 P. 520 (1924) the jury found by a special verdict that the plaintiff's car was off the main-traveled part of the road. The Court approved an instruction stating in part that if the plaintiff parked his car upon the main-traveled part of the highway when it was not disabled, he would be guilty of negligence.

In *Townsend v. Jaloff*, 124 Or. 644, 264 P. 349 (1928), a milk-truck driver parked his truck with only 12 to 18 inches thereof off the pavement. The Court reversed a judgment in his favor for failure of the court below to give an instruction that the plaintiff was thereby guilty of negligence as a matter of law. The Court emphasized the fact that the truck was not disabled, and that there was a stretch of solid shoulder adjoining the spot where he parked, upon which he could have parked completely off the highway.

In *Martin v. Oregon Stages*, 129 Or. 435, 277 P. 291 (1929), the plaintiff's fog light was loose and waving to and fro. It was a dark and rainy night, and there was considerable traffic. He drove it "as far off the highway as he safely could," in order to adjust the light. The wheels were about two feet on the paved portion. The Court pointed out that one who parks a motor vehicle on the main-traveled highway without necessity therefor is guilty of negligence, but that it was a jury question in that case whether it was safe to proceed further.

In *Holman v. Uglow*, 137 Or. 358, 3 P. 2d 120 (1931), the plaintiff's car had run out of gas, and he and the other two occupants were attempting to push it to a place of safety. The shoulder alongside where they originally stopped was narrow and muddy, and a graveled area was available 450 feet ahead. The Court held that an automobile may use a portion of a roadway in an emergency, if exercising due care, for making repairs "rendered necessary by the inability of his car to proceed," and held it to be a jury question whether the plaintiff was negligent in not leaving the car where it was.

In *Gossett v. Van Egmond*, 176 Or. 134, 155 P. 2d 304 (1945) a car, because of engine trouble, could not be driven under its own power. Plaintiff's car was preparing to tow it, and was struck by defendant's vehicle. The Court held that, giving the statute a reasonable and workable construction, the cars were not "parked" along the highway within the meaning of the statute. The cars were on the shoulder, on the verge of the ditch, and could not be moved further off the highway.

In *Morris v. Fitzwater*, 187 Or. 191, 210 P. 2d 104 (1949), plaintiff's car's lights went out. She steered to the edge of the highway, and stopped on the shoulder, about six inches from the ditch, with the left wheels about 18 inches on the paved highway. The Court held, with reference to the question in-

volved in this case, at p. 197:

“There was, however, a conflict of testimony as to whether or not plaintiff’s car could have been parked entirely off the main traveled portion of the highway, which, if such parking is practicable, the statute requires to be done. Such conflict made the question of whether or not the car was parked contrary to the statute one for the jury, and the court did not err in refusing to withdraw it.”

Finally, in *Shelton v. Lowell*, 196 Or. 430, 249 P. 2d 958 (1952), the Court found it to be an issue for the jury whether the defendant was negligent in not having its disabled truck towed out of the way by another truck of the same company. The truck was occupying practically the entire width of one lane of the highway, and the jury could have found that the other truck could have towed it off to a safe place.

Returning to the instant case, it was entirely a matter of speculation whether plaintiff’s car was disabled within the meaning of the statute. The burden of establishing this fact, in view of the plain command of the statute, and his admitted location entirely on the traveled portion of the highway, was on plaintiff. *Watt v. Associated Oil Co.*, 123 Or. 50, 260 P. 1012 (1927). He failed to produce any substantial evidence that the car was disabled, and the jury would not have been warranted in so finding. In the absence of evidence that it was not practicable for

him to pull into either of the readily available and safe places completely off the highway, he must be held to be guilty of negligence as a matter of law in violating ORS 483.320.

Once it is established that plaintiff violated the statute in parking his vehicle on the main traveled portion of the highway when it was practicable to park it off the highway, the question of proximate cause is readily answered. As the Court said of this precise situation in *Martin v. Oregon Stages*, 129 Or. 435, 277 P. 291 (1929):

“Whether or not plaintiff parked his truck on the main-traveled portion of the highway determines the charge of negligence under consideration. *If plaintiff parked his truck as asserted by defendant, he is guilty of negligence as a matter of law and cannot recover. There could hardly be a difference of opinion regarding such negligence contributing to plaintiff’s injury.*” (Emphasis supplied).

See also, *Leap v. Royce*, 203 Or. 566, 279 P. 2d 887 (1955), in which the Oregon Court held that if the plaintiff violates a legislative enactment which is designed for the prevention of the very accident which occurs, and the accident could not have happened but for the violation, the violation is as a matter of law the proximate cause of the accident. These conditions are present in this case.

3. *Plaintiff was Guilty of Contributory Negligence in Placing Himself in a Dangerous Position on the Highway, and in Failing to Keep a Lookout.*

In considering this issue, it is necessary to examine the total situation which confronted plaintiff at the time of the accident. He knew that the road was quite slippery, to an extent that he would not have had control of his car had he continued to drive without chains (R. 17). It was snowing (R. 16, 28), the sky was overcast, and visibility was not too good (R. 28). At the place where plaintiff parked, the road was deeply banked down toward him (R. 51).

Under these circumstances, with safe places to stop available immediately before he reached the guardrail, and immediately across the highway (R. 40), plaintiff chose to stop two to four feet from the guardrail (R. 17), which meant he was more than one to three feet from the edge of the paved highway (R. 39-40), for the purpose of putting on chains. Then, instead of posting his passenger as a lookout, and putting the chains on one at a time, each man started working on one of the rear wheels, plaintiff being engaged in putting a chain on the left one (R. 18).

Immediately before the impact, plaintiff was lying prone on a blanket along the left side of his car (R. 18-19). The situation was diagrammed by plaintiff on a blackboard, (R. 15) which is, of course, not a

part of the record*. Plaintiff did testify that he was "right up close" to his car (R. 19), but in view of the distance he had parked from the guardrail and the width of the car, he must have been in the neighborhood of ten feet from the edge of the highway.

It thus appears that plaintiff was lying almost in the center of a major highway, which was banked toward him. Apparently he was just past the center of a curve (R. 24). The pavement was slick, and visibility was not too good. There is no evidence whatsoever that in this perilous situation plaintiff took any precautions for his own safety. He did not attempt to keep a lookout and was not aware of the approach of defendants' fifteen-ton truck and trailer (R. 50) until it was virtually upon him (R. 18). In fact, the truck had passed plaintiff, and the back end of the trailer was what hit plaintiff (R. 18, 32). The truck had approached at about 20 to 25 miles per hour (R. 31). Plaintiff had a passenger (R. 14), who was working on the other rear wheel (R. 18). There is no evidence that he was keeping a lookout either, or that plaintiff was relying on him to do so.

Under these circumstances, it is apparent that plaintiff was not exercising the care of an ordinary

* The Oregon Supreme Court has had frequent occasion to comment on this practice, and on the fact that an appellant must take the consequences of any deficiencies in the record resulting from the failure to put such a diagram in permanent form. See, e.g., *Birks v. East Side Transfer Co.*, 194 Or. 7, 38, 241 P. 2d 120 (1952); *Wellman v. Kelley*, 197 Or. 553, 570, 252 P. 2d 816 (1953); *McAdam v. Royce*, 202 Or. 245, 251, 272 P. 2d 986, 274 P. 2d 564 (1954).

reasonable man for his own safety. There is no evidence, in fact, that he exercised any care at all. Even if his vehicle was disabled, so that he had no choice about stopping where he did, he was under an obligation to exercise a degree of care commensurate with the danger of the situation which existed. It can hardly be contended that it was not dangerous to lie prone virtually in the center of a major highway, with what, from the record, was apparently at least moderate traffic. Not only that, but the road conditions were such that plaintiff felt that he would not have had control of his car had he continued to drive. He had arrived at that point without stopping to put on chains, however, and it was reasonable for him to anticipate that some other vehicle might get that far without employing them, and try to drive by on the slippery highway.

It hardly requires citation of authority for the proposition that the degree of care which must be exercised by a person for his own safety is commensurate with the danger to be avoided. This is the rule both in the Oregon and the Federal courts. *Morris v. Fitzwater*, 197 Or. 191, 198, 210 P. 2d 104 (1949); *Burroughs v. Southern Pac. Co.*, 153 Or. 431, 433, 56 P. 2d 1145 (1936); *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 424, 438, 442, 84 P. 389 (1906); *Fred Harvey Corp. v. Mateas*, 170 F. 2d 612, 616, (CCA 9, 1948). Despite the obvious hazards of his position, which plaintiff must have appreciated, there is not a scintilla of evi-

dence of any attempt to guard against the danger, other than a blind reliance on the ability of other motorists to see him, although the visibility was obscured, and avoid him, although the road was slippery and banked toward him. When one thus places himself in a position of danger, without making any effort to protect himself, he is not exercising reasonable care, and it must be held as a matter of law that he is guilty of negligence which contributed to his injury.

An analogous case is *Borgert v. Spurling*, 191 Or. 344, 230 P. 2d 183 (1951). Plaintiff was a passenger traveling in Potterf's car, which ran out of gas. The members of the party pushed it on to the shoulder, as close to the ditch as was practicable, but part of it remained on the highway. Another car, owned by one Fox, offered assistance, and eventually an attempt was made to siphon gas from the Fox car to Potterf's car. For this purpose, the Fox car was parked on the highway alongside Potterf's car, and pointing in the opposite direction. It was night, and the headlights of the Fox car were burning. Plaintiff and another were standing at the rear of plaintiff's car engaged in siphoning gas when defendant ran into them.

The Court, while holding that plaintiff's car was disabled and hence not negligently parked, found that Fox's car was clearly parked in violation of the statute. The Court also held that the evidence

was too indefinite and uncertain to determine whether plaintiff was in any way responsible for the parking of the Fox car. "But the plaintiff knew, or should have known, of the dangerous situation, and he accepted it as a means through which the Potterf car might be gotten on its way again." (191 Or. at p. 352). The Court went on to state:

"In these circumstances, it might well be urged that the plaintiff was guilty of negligence in undertaking to busy himself about the rear of the Potterf car. Whether this be so or not, it cannot be doubted that reasonable care for his own safety called for the exercise of a high degree of vigilance while he was thus engaged. The fact is, however, that he took no care whatever, as the following excerpt from his cross-examination demonstrates . . ."

The quoted testimony reveals that plaintiff did not keep a lookout in either direction, or ask anybody to do so for him. In that respect, the case is similar to the one before us. In other respects, the cases are analogous. Although we do not here have the dangerous situation created by the lights of the Fox car in the *Borgert* case, we do have the fact that the road was exceedingly slippery, was banked down toward the plaintiff, and that he was lying down almost in the middle of the highway.

In the *Borgert* case, the Court relied on the case of *Tibbetts v. Dunton*, 133 Me. 128, 174 A. 453 (1934) as being analogous and correctly stating the applicable rule of law. In that case, the plaintiff was changing a tire. His car was parked partly on the shoulder and partly in the highway. The Court held that whether he had violated the parking statute was a question for the jury's determination, but that plaintiff was contributorily negligent in failing to keep a lookout and observe the approach of traffic, rather than trusting his safety entirely to the driver of the approaching car. After discussing the parking statute, the Court stated:

“But apart from this statute, the verdict must be overturned because of contributory negligence of the plaintiff in another respect. Even though he had the right to change this tire there on the highway, would he recover for injuries received while so doing, he must at the time himself have been in the exercise of due care in the performance of his work. The right to stop for a reasonable length of time to do reasonably necessary work on the automobile does not relieve one of the duty of exercising due care for his own safety, while so engaged.

A careful reading of the record, particularly the evidence of the plaintiff himself, convinces us that instead of proving due care while changing this tire, he clearly demonstrated his lack of it. In the observance of due care he was bound, would he not have been contributorily

negligent, to do for his own safety that which the ordinarily careful and prudent person would have done under the same circumstances. The vigilance of such a person he must have exercised in his own behalf and it should have been 'commensurate with the danger arising from lack of it.' . . . The greater the danger, correspondingly greater is the vigilance required."

This case, which received the express approval of the Oregon Court, is authority for the proposition that plaintiff here was guilty of contributory negligence even if he was legally parked on the highway. There is nothing in the *Tibbetts* case, moreover, to indicate that the danger was as great as it was in this case—plaintiff's car there was only partially on the highway whereas here it was two to four feet from the guardrail, and in the instant case, the road was slippery as well.

The record here demonstrates as conclusively as the record in either the *Borgert* or *Tibbetts* cases the lack of care of the plaintiff for his own safety. Not only is there no evidence to indicate any attempt to give a warning, to keep a lookout, or to ask his passenger to keep a lookout for him, but in addition, plaintiff was so inattentive to his surroundings as to be unaware of the passage of a 31,000 pound truck and trailer, 60 feet long (R. 41), until it was too late to avoid being hit by the rear portion of the trailer (R. 19, 32, 51).

Once again, plaintiff's negligence in the respects indicated being established, "That his negligence contributed to his injury we think there can be no doubt." *Borgert v. Spurling*, 191 Or. at p. 355.

4. *Plaintiff Assumed the Risk of the Danger Attendant Upon Putting Chains on His Vehicle at the Time and Place in Question.*

The Oregon Supreme Court has recently concluded that the defense of assumption of risk is available in Oregon to an action for negligence. *Hunt v. Portland Baseball Club*, 62 Or. Adv. Sh. 805, 296 P. 2d 495 (1956). Although the limits of the doctrine are not defined in that case, quotations from Prosser on Torts and the Restatement indicate that the conventional doctrine, as applied in other jurisdictions, is also the law of Oregon.

The courts have frequently commented upon the distinction between assumption of risk and contributory negligence, and their similarity to one another. See, e.g., the discussions in *Southern Pacific Co. v. McCready*, 47 F. 2d 673, 674-677 (CCA 9, 1931) and *Weber v. Eaton*, 160 F. 2d 577, 578-579 (CADC, 1947). It seems to be established that both may co-exist, although ordinarily, if contributory negligence is present, the presence of assumption of risk as well is irrelevant. In the *Hunt* case, the Oregon Court, by its reference to *Adair v. Valley Flying Service*, 196 Or. 479, 250 P. 2d 104 (1952), as a case

in which the basis of the decision was contributory negligence because of the condition of the pleadings, but which could equally well have been decided on the basis of assumption of risk, adopts this view.

The situation is well outlined by Prosser on Torts (2d Ed.), p. 305, in the following language:

“In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. The two may coexist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken to have known of them, and risks which he merely might have discovered by the exercise of ordinary care.”

The facts already stated establish that the dangers of plaintiff's position were so obvious that he must be taken to have known of them. One cannot lie in the middle of the pavement of a well-traveled highway on which cars are skidding, spinning their wheels, and getting stuck and then claim that he did not appreciate the fact that his course of conduct involved a risk. The fact that the risk was an unreasonable one renders the conduct of the plaintiff negligent, but the fact that he must have known

of and appreciated the dangers, and chose to subject himself to them, is an example of assumption of the risk.

Two early Oregon cases, although decided on the basis of contributory negligence, involve the same principles as here discussed. In *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 423, 84 Pac. 389 (1906), plaintiff's decedent approached too close to a fallen electrical wire and was killed. While holding that contributory negligence precluded a recovery, the Court used language appropriate to the issue of assumption of risk, saying:

“ * * * the rule of law is that one who voluntarily assumes a position of danger, the hazards of which he understands and appreciates, cannot recover from a risk incident to the position.”

In *Young v. Prouty Lumber & Box Co.*, 81 Or. 318, 159 P. 565 (1916), the plaintiff was injured by a plank being dropped from a conveyor to the receiving platform on which plaintiff was standing. Plaintiff knew the plank was coming, but failed to get out of the way because he thought he was in a safe place. The Court held that any evidence from which it could be concluded that the men who threw the plank down were negligent was also evidence of plaintiff's negligence, for he knew all that they knew. Having remained in a place of danger, knowing of the risk, plaintiff could not recover.

Any reasonably prudent person in plaintiff's position must have recognized the risk of another vehicle skidding or sliding down the slippery slope of the highway toward him. This was the danger to which he voluntarily exposed himself, and it was precisely the occurrence that led to his injury. He assumed the risk of such an occurrence and is not entitled to recover damages on account of it.

B. There Was No Substantial Evidence that Defendant Was Guilty of Negligence.

Once again, in determining whether the trial judge was correct in holding that there was no substantial evidence of defendants' negligence to submit to a jury, we must look at the total picture confronting the parties. Plaintiff, in his Brief, at pages 5 and 6, paints a horrendous picture of defendant trying to steer his tremendous rig through a narrow gap between parked cars on a "supered" highway which was slick with snow. He concludes that Buck failed to maintain control of his trailer and "gave himself but a margin of five feet in the initial instance."

It is precisely here, however, that the flaw in plaintiff's conception of the case appears. Defendant did not give himself a margin of only five feet—plaintiff left him only that margin! Defendant was required to take the situation as he found it; a dangerous situation indeed, but one created by the

negligence of plaintiff. Even had the situation not been the result of plaintiff's negligence, but solely of the weather conditions, it was certainly not the fault of the defendants.

Plaintiff and his car were occupying up to about ten feet of the pavement on defendant's side of the road when defendant came along; that is why it was necessary for defendant to drive up on the upper side of the highway. Although plaintiff estimated that there was 30 to 40 feet of space between his car and the car parked across the highway, he admitted that the other car was off the highway, and that the highway was only 26 feet wide (R. 23). That is why it was necessary for defendant to pass within five or six feet of plaintiff.

Although plaintiff charged the defendant with traveling at an excessive speed under the circumstances (R. 5), there is no evidence to support such a charge. The highest estimate of defendant's speed, made by plaintiff's witness Moore was "20 miles an hour; maybe 25." All the witnesses agreed that the trailer slid down the slope of the highway toward the plaintiff (R. 19, 32, 50). This could only have happened because the speed was too slow to maintain the forward momentum, rather than the contrary (R. 46). Plaintiff seems to have adopted this view on appeal (R. 6). But, under the circumstances, it would have been negligence to have

traveled any faster, in view of the dangerous condition created by plaintiff's presence on the highway. Defendant had to maneuver his truck and trailer through the gap, and he necessarily slowed down to do so (R. 43). The control he had over his vehicle is illustrated by plaintiff's own testimony that the truck was brought to a stop, on that slippery highway, within "10 or 12 feet" (R. 19).

Moreover, defendant had to keep going, because if he had stopped, he would have slid down the highway into the cars parked behind plaintiff's (R. 47). He had been planning to stop, but he was waved through by Moore (R. 47), who originally denied having done so (R. 34), but after examining his statement admitted that he had (R. 39).

There is absolutely nothing in the record to evidence any act of negligence on the part of Buck which caused the trailer to slide down the grade into plaintiff. He was forced to accept the situation as he found it, a situation not of his own making but of plaintiff's. Like plaintiff, he had not anticipated the slipperiness of the highway (R. 43) until he got to the point where plaintiff had stopped, and by then it was too late to do anything but try to go through the remainder of the highway left for his use. His skidding was caused, not by a sudden application of the brake, or by acceleration, but by the slowing down necessitated by the situation.

Defendants have no quarrel with the rules of law stated in any of the cases cited by plaintiff, but it is apparent that none of them are even slightly analogous to this situation. Thus, in the case of *Deyo v. Detroit Creamery Co.*, 257 Mich. 77, 241 N.W. 244, there was evidence that the defendant's truck made a sudden and unnecessary turn, which caused the trailer to skid and injure the plaintiff. Moreover, defendant was not faced with a difficult situation created by the plaintiff's negligence. In this case, there is no evidence that defendant did anything to cause the trailer to slide other than slow down, and that was made necessary by the narrow area of the highway left for him to travel on.

In *W. & W. Pickle & Canning Co. v. Baskin*, 236 Ala. 168, 181 So. 765, the plaintiff's intestate was lawfully using the highway, two feet off the pavement. Defendant's trailer had to go off the highway to strike him, which was caused by turning too far to the right in the first instance and swerving to get back on the road. Again, the distinction is obvious. Plaintiff herein was occupying half of the highway, and it was his negligence, rather than defendant's, which created the dangerous situation.

In *Cook v. Miller Transport Co., Inc.*, 319 Pa. 85, 179 A. 429, the street was 34 feet wide, but the truck passed within five feet of the boy who was standing five feet from the curb. It is obvious that the truck

was driving in the center of the highway instead of on its own side. When another vehicle approached, the truck had to swerve to the right, and its trailer skidded to the left, injuring the boy. If the truck-driver had not been negligent in driving partially on the wrong side in the first instance, the accident could not have happened. The position of the boy did not in any way restrict his use of the road.

In *White v. Kretz Bros.*, 122 Cal. App. 197, 10 P. 2d 198, defendant was driving with his left wheels only three feet from the left side of the highway, almost completely in the wrong lane. Plaintiff was virtually off the highway, coming in the opposite direction. When the truck driver attempted to swerve back on to his own side, the trailer swung over and hit plaintiff's car.

In *Commercial Carriers v. Small*, 277 Ky. 189, 126 SW 2d 143, the defendant's truck approached a narrow bridge at an excessive speed, swaying back and forth. It was on the wrong side of the road. Plaintiff was almost stopped, just before coming to the bridge. He was on his own side of the road, going in the opposite direction. The truck driver swerved back to his own side, and the trailer swung out to the left, hitting plaintiff's car.

In *Thomas v. Shippers Express & Warehouse Co.*, 158 So. 859 (La. App.) the plaintiff was where he

had a right to be, off the highway. Defendant's truck driver negligently engaged in some horseplay with friends along the side of the road, and then looked back and waved to him, and his truck ran off the right. He swerved, and his trailer moved sideways into plaintiff.

All of the foregoing cases have in common the fact that the driver of the truck made a sudden swerve which was either unnecessary or necessitated by the defendant's own prior negligence. In all of them the plaintiff was making a lawful use of the highway. In none of them was the defendant faced with a dangerous situation, other than one of his own making. Put simply, in all of them some act of negligence was shown which caused the trailer to skid or swerve into the plaintiff.

The quotations from Blashfield are not very meaningful in the absence of a discussion of the cases which support them. In a work of that kind, which does not purport to be a scholarly analysis of the law, but merely a description of the cases, it is easy to find general language to support any side of the controversy. To illustrate, some of the other statements made in the same section quoted by plaintiff (Sec. 749, Vol. 1, Part 2) are:

"The skidding of an automobile may be made the basis of a finding of negligence only if it was due to some negligent conduct on the part of the motorist."

“If the accident resulted from the condition of the road and not from any negligence of the driver, no liability exists.”

“In determining whether the skidding of a motor vehicle was caused by some negligent act or omission on the part of the driver, or in determining liability for an accident, the condition of the pavement or highway, and the question whether the driver took that condition into account, the speed of the vehicle, the use of the brakes, and the nature and course of the skidding are matters which can be taken into consideration.

“The tendency to skid on a wet or icy pavement is increased very materially by accelerating suddenly, or suddenly applying the brakes.”

The latter paragraph incidentally, is from the same authority quoted by Blashfield for the statement plaintiff cites, that “Nineteen out of twenty skids could have been avoided.” No doubt most of the nineteen are those in which a sudden braking or acceleration took place. There is no evidence that it did so here.

The first two paragraphs are substantiated by the weight of authority, including cases from the jurisdictions from which plaintiff cites decisions. Thus, in *Richardson v. Patterson*, 368 Pa. 495, 84 A. 2d 342 (1951), defendant was driving on a straight, level highway at twenty miles per hour. It was a cold, gusty day, with snow flurries, and there were

patches of ice on the road. She suddenly skidded across the highway onto plaintiff's side. The Supreme Court of Pennsylvania, in a 5-1 decision, affirmed a judgment of nonsuit, saying:

"The skidding of a vehicle does not of itself establish or constitute negligence. It is incumbent upon the plaintiff to prove the skidding resulted from the negligent act of the defendant; otherwise he is absolved from the consequences."

The defendant there was not trying to maneuver a heavy truck and trailer through a narrow gap on a supered highway, but was driving on a straight level road. If skidding under those circumstances is not enough to establish negligence, how can it be negligence in this case?

In *Atlantic Greyhound Corp. v. Franklin*, 301 Ky. 867, 192 S.W. 2d 753 (1946), a Greyhound bus skidded into another bus while turning a corner on an icy street. The Court held that in the absence of evidence of negligence, a verdict for plaintiff must be reversed, with instructions to enter judgment for defendant.

In *Sherwood v. Radovsky*, 317 Mass. 307, 57 N.E. 2d 912 (1944), plaintiff's car had just had a collision with another car, and she was standing between them. Defendant skidded on the very slippery and icy roadbed, and struck one of the cars, jamming

plaintiff between them. The Court reversed a judgment for plaintiff with directions, saying:

“It has been held repeatedly by this court that ‘the mere skidding of a motor vehicle, unexplained, is not evidence of negligence.’ * * * In the case at bar the evidence disclosed nothing bearing on the question of negligence beyond the fact that the defendant’s automobile on an icy day skidded into the plaintiff’s automobile and pushed it about three feet. It is true that skidding may occur in connection with other acts or omissions of the operator of an automobile in such circumstances as to warrant a finding of negligence * * * But on the evidence here the cause of the skidding remains unexplained by any negligent act or omission on the part of the defendant * * *.” (Citations omitted).

In *Walls v. Consolidated Gas Utilities Corp.*, 150 Kan. 919, 96 P. 2d 656 (1939), a gas truck traveling 17 miles per hour on an icy, slippery, street, hit an eight year old boy. The Court held that there was no evidence of negligence, pointing out that the speed of the truck’s stop was indicative of good brakes. A judgment for plaintiff was reversed with directions.

In *Weiner v. J. I. Hass, Inc.*, 251 App. Div. 412, 296 N.Y.S. 703 (1937); aff’d, 276 N.Y. 661, 13 N.E. 2d 51 (1938), plaintiff’s decedent’s truck was standing in the highway, unable to move because of ice on the road. Decedent was lying on the pavement with his legs sticking out. Defendant was driving downhill

slowly, tried to stop, and skidded into the truck. The Court held that there was no evidence of negligence.

In *Bradley v. Thomas M. Madden Co.*, 333 Ill. App. 153, 76 N.E. 2d 797 (1948), only the abstract was published. It indicates that defendant skidded to the wrong side of the street on any icy pavement. He was traveling 20 miles per hour. He was held not guilty of negligence, in the absence of any showing of negligent acts. Plaintiff's judgment was reversed with directions.

In the instant case, there is not a scintilla of evidence of negligence. That defendant was traveling at a reasonable speed can hardly be controverted, in view of the fact that he brought a 15-ton rig to a stop on a slippery supered highway within ten or twelve feet. In fact, had he been going faster, the trailer would not have slid downhill. But it can hardly be said that under the circumstances he was negligent in not going faster.

Plaintiff's position seems to be that he had created a situation so dangerous, by parking in the highway to put chains on, that it was negligent for anyone else to try to use the highway at all, at any speed. We do not believe that this position will commend itself to the Court. Defendant was proceeding with due care, and attempting to negotiate the highway in the situation he faced, which was not his responsibility. Under the circumstances, there

was nothing else he could have done. The trial court was correct in ruling that there was no evidence of negligence.

CONCLUSION

Plaintiff has not chosen to argue in his opening brief the ground for dismissal asserted by defendants at trial, and hence we do not know what explanation he offers for his conduct, or how he proposes to show that it was consistent with ordinary prudence. We will have no attempt to rebut whatever argument he may make in reply. But the facts of the case make the conclusion of contributory negligence and assumption of risk so manifest that they constitute a rebuttal in themselves.

The argument of plaintiff, in fact, is self-defeating. The more he attempts to show that the situation was so dangerous that defendant was negligent in trying to drive past, the more he demonstrates his own foolhardiness in lying on the highway under the circumstances, without taking even the slightest precaution for his own safety.

Defendant had to take the circumstances as he found them. He was necessarily required to drive up on the upper side of the supered highway, within a few feet of plaintiff, because that was all that was left of the highway for him to travel on. Plaintiff and his car were blocking the rest. He traveled

at a reasonable speed, and under good control, and was almost successful in avoiding an accident despite the danger inherent in the situation. There is no evidence of any negligence on the part of the defendants which caused the trailer to slide down into plaintiff.

Wherefore, defendant respectfully submits that the judgment of the court below is free from error, and should be affirmed.

Respectfully submitted,

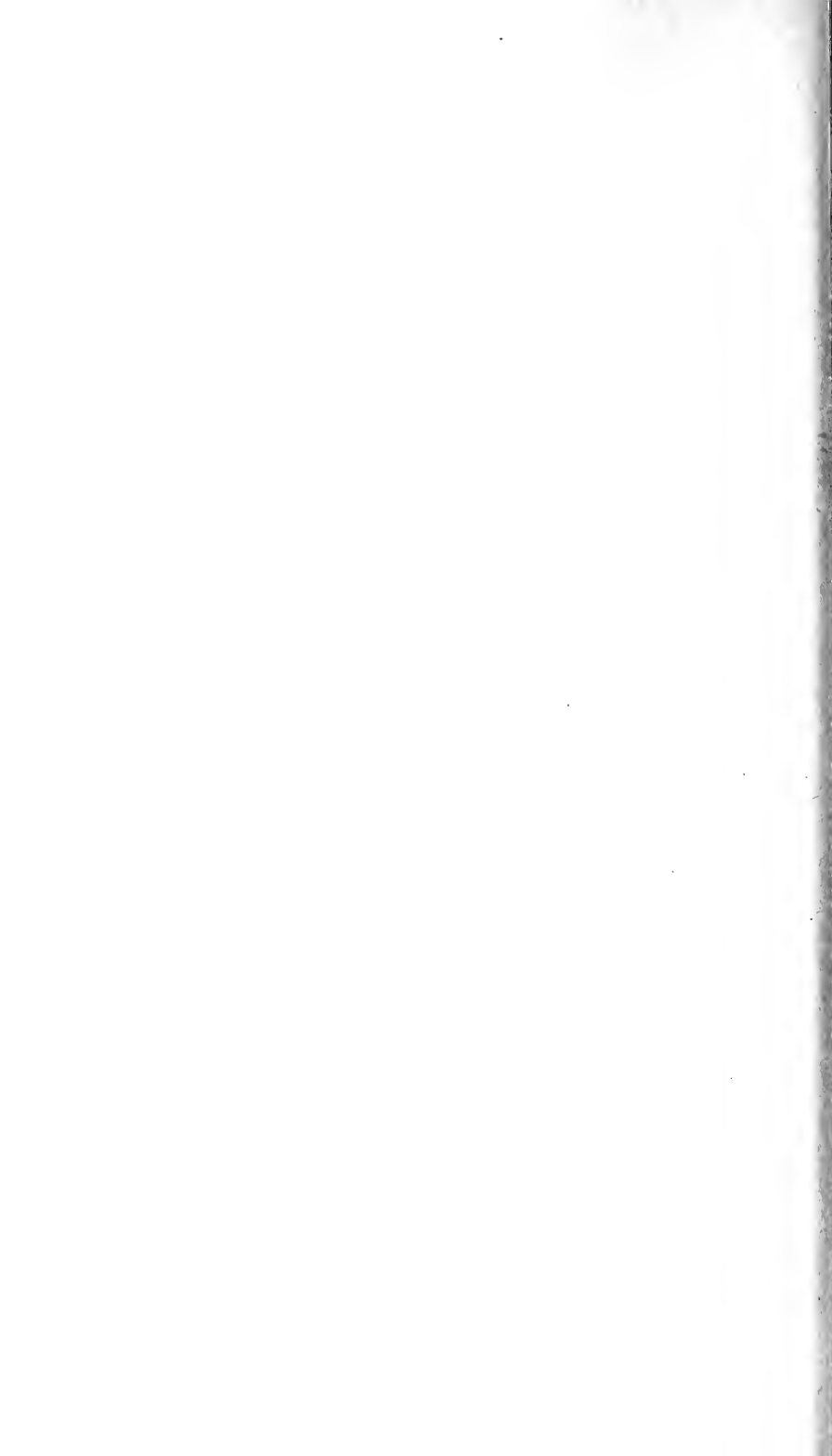
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**United States
Court of Appeals
For the Ninth Circuit**

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Appellees.

Appellant's Reply Brief

**Appeal from the United States District Court for the
District of Oregon.**

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**United States
Court of Appeals
For the Ninth Circuit**

FLOYD SMITH,

Appellant,

vs.

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Appellees,

**Appeal from the United States District Court for the
District of Oregon.**

SUMMARY OF ARGUMENT

Plaintiff* cannot be held guilty of contributory negligence as a matter of law nor is any doctrine of assumption of risk applicable.

Not only did plaintiff present sufficient evidence to make it a jury question as to whether or not his vehicle was disabled, but there was likewise sufficient evidence to establish that he was properly parked in compliance with the affirmative portions of the cited statute whether disabled or not.

**For clarity, appellant will adopt the designation of plaintiff-defendant used by appellees in their Answering Brief in this Reply Brief.*

As to assumption of risk, this doctrine, in common parlance, had its origin in the master-servant relationship, was later extended to sports activities and in the case of **Hunt v. Portland Baseball Club**, 62 Or. Adv. Sheets 805, 296 P. 2d 495, was extended to the spectator at a sports game.

Plaintiff will not assume the burden of an academic debate upon whether or not such a doctrine of "assumption of risk" should be further extended; suffice it to say that its extension to the case at bar would result in a drastic abrogation of a substantial portion of the existing applicable law.

Assuming a vehicle otherwise "parked" in violation of the statute but legitimately disabled, the present rule is that it is a proper use of the highway for the driver to halt his car and work about it to remedy the defect subject to a jury's determination as to whether or not such conduct was reasonable under all the facts and circumstances. To impose the doctrine of "assumption of risk" in the fashion defendants suggest, would be to declare the rationale that if a vehicle is parked in violation of the statute, even though disabled, the danger meant to be prevented by the statute is assumed by the driver and bars his recovery in every instance, doing away with the present jury question as to contributory negligence.

SUMMARY OF ARGUMENT

Sufficient evidence was submitted from which the jury could determine that defendants were negligent.

In their argument upon this point defendants overlook those portions of the testimony at variance with that quoted. While the defendant Buck testified that the distance between plaintiff's vehicle and the vehicle opposite it was 15 to 16 feet, the plaintiff testified that this distance was 30 to 40 feet and the witness Moore, 25 to 30 feet. How close the defendants came to plaintiff in passing him is determined by the defendant's own testimony that five or six feet was all the distance the trailer slid in order to strike plaintiff.

Plaintiff cited 15 feet in his Opening Brief to show how narrow and dangerous the aspect of the passage had to appear in defendant's own eyes. His negligence is twice as apparent and twice as reprehensible if he had from 25 to 30 feet or even 40 feet for his passage and nonetheless undertook to pass within five feet of plaintiff.

The situation was not created by plaintiff as defendants contend. Plaintiff was first upon the scene. When his vehicle came to halt there was no one opposite him and the roadway was unobstructed and clear for a distance far in excess of 16 feet. Defendant's contention that "the more plaintiff attempts to show

that the situation was so dangerous that defendant was negligent in trying to drive past, the more he demonstrates his own foolhardiness . . ." is in fact applicable directly in reverse. The obvious dangers of which both parties now speak are those that existed when the defendants came upon the scene but did not exist when plaintiff's vehicle came to a halt. It was after plaintiff halted that a vehicle was driven to the wrong side of the road to be halted precisely opposite him and that a truck and trailer unit attempted to negotiate the passage between. Defendants, however, approached the scene with this second car in position and attempted to negotiate the passage with such a compound vehicle and in the face of the steep bank down towards plaintiff, passing so close to plaintiff when they began their attempt as to leave no room for the obvious probability that the free swinging trailer without its own motive power would obey the law of gravity and slide down into plaintiff.

ARGUMENT

A. Plaintiff was not guilty of contributory negligence and the theory of assumption of risk is not applicable.

(1) Plaintiff was not guilty of contributory negligence.

The proper consideration of the applicability of O. R.

S. 483.320 requires a consideration of the scene at the time plaintiff's vehicle came to a halt.

Plaintiff was the first to arrive and there were no other vehicles present when his vehicle came to a halt upon his own side of the road within 24 to 36 inches from a steel guard rail that prevented him from removing it further. It was after he was in this position that a vehicle halted opposite him (Tr. of R. p. 22). If there was a minimum of 15 to 16 feet between plaintiff's vehicle and this latter vehicle after it had halted, there was an unobstructed roadway opposite the defendant in excess of 20 feet prior thereto.

The witness Moore likewise brought his vehicle to a halt after plaintiff had halted (Tr. of R. p. 29). He parked behind plaintiff, but before he did so plaintiff's vehicle was visible for a distance of 150 to 200 yards in the direction from which the defendants approached (Tr. of R. p. 30).

The cited statute can be divided into three parts for our purpose. The first is the injunction that no vehicle shall be parked upon the paved or main traveled portion of any highway when it is practicable to park it off such portion of the highway. The second part turns to the instances when it will not be practicable and commands that in no event shall there be less than 16 feet of unobstructed width of the main traveled portion of the highway left open for passageway and

that the vehicle shall be in clear view for a distance of 200 feet in either direction. The third part is the proviso that neither of these injunctions shall apply in the instance of a disabled vehicle which, under the decisions, is deemed to be using the highway for a proper purpose and not to be "parked."

There is sufficient evidence to show plaintiff's obedience to the affirmative provisos of this statute, setting aside for the moment the exception. Plaintiff brought his vehicle to a halt with 24 inches of a steel guard rail on his own side of the road on a snow-packed highway for the purpose of putting on chains. There was a clear and unobstructed roadway opposite him in excess of 16 feet and his vehicle was clearly visible for a distance in excess of that required.

Since the plaintiff was properly "parked," if "parked" and not disabled, the fact that there was an additional width present on his side of the road at some point to the west and one across the road from where he halted, is irrelevant. It is irrelevant, however, for an additional reason. When the plaintiff brought his vehicle to a halt, there being no other vehicles present, the width of the road was constant; the extra widths on either side of the road, but not opposite each other, compensating one for the other. It made no difference at that time where plaintiff parked in so far as his obedience of that statute was concerned.

The suggestion of defendants that plaintiff should have crossed over to the wrong side of the road to halt his vehicle is likewise irrelevant. Again, not merely because plaintiff was properly "parked," but because, as might be suspected, Oregon law, O. R. S. 483.302, provides that it is the duty of a driver to drive upon the right half of the highway. In addition O. R. S. 483.338 specifically provides that on mountain highways, a driver shall hold his vehicle under control and as near to the right hand side of the highway as reasonably possible.

The witness Moore said of his observation of the vehicle that came to a halt opposite plaintiff as follows: (Tr. of R. p. 29)

"I seen there was a woman stuck on the left hand side of the road facing the wrong direction, going the same direction we were going, on the wrong side of the road. She was stuck."

No reason existed why plaintiff, first upon the scene and in imminent danger of losing control of his vehicle altogether for lack of traction, should suddenly conceive it his duty to attempt to cross over to the "wrong side of the road" in clear violation of O. R. S. 483.302 and O. R. S. 483.338 to bring it to a halt.

So much for affirmative compliance with O. R. S. 483.302.

We turn now to the evidence establishing that he

was excused from compliance by virtue of his vehicle being "disabled."

A vehicle is defined as disabled "when it cannot be safely moved to a place of safety under its own power." **Shelton v. Lowell**, 196 Or. 430, 249 P. 2nd 958. A cursory examination of defendant's authorities reveals the disability of the vehicle and the effect of the statute is a question of fact for the jury. Each of the cases cited by defendants in which a disability of the vehicle was in issue was submitted to the jury, and some under facts far less drastic than those in the case at bar.

The defendants acknowledge upon pages 10 and 11 of their brief, that plaintiff's vehicle had lost traction, that his wheels were spinning, and that he could not have driven further and maintained control of his car. Their contention seems to be that something can be made of the fact that it could still be moved, with or without control. The defendant sums up upon page 11:

"It appears from this testimony as if plaintiff's car was still able to move, although he would not have had control of it if he had attempted to proceed further."

Compare this with the factual situations in the cases cited by defendant in each of which the subject was held a jury question. In **Dare v. Boss**, 111 Or. 190, 224 P. 646, plaintiff had a flat tire. It is common knowledge

that a vehicle with a flat tire can be moved on the tire and then on the rim.

In **Martin v. Oregon Stages**, 129 Or. 435, 277 P. 291, the plaintiff's fog light was loose and waving to and fro. The addition of a fog light is admittedly an aid, but hardly a necessity, in the driving of a vehicle.

In **Holman v. Uglow**, 137 Or. 358, 3 P. 2d 120, plaintiff's car was out of gas. No issue was made of the negligence of one who permits his vehicle to get in that position.

In **Morris v. Fitzwater**, 187 Or. 191, 210 P. 2nd 104, plaintiff's lights went out. Admittedly a car with its lights out can still be moved if defendant's standard is applicable.

At best, therefore, if plaintiff did not "park" his vehicle in accordance with the statute when it came to a halt, it would be question for the jury as to whether or not his vehicle was disabled under the exception of the statute.

(2) Plaintiff was not negligent in attempting to remedy the disability of his vehicle nor in the fashion in which he did so.

Defendants next point that the plaintiff placed himself in a dangerous position on the highway and failed to keep a lookout. They raise this as if it were separate

and distinct from a charge of contributory negligence for halting his vehicle where he did.

It is no such separate point. It will be noted that in each of the cases cited by the defendant and heretofore discussed, none are actions for damages to the vehicle but each is for personal injuries sustained when plaintiff was attending his disabled vehicle or attempting to make repair. The occurrence of the disability makes it a proper use of the highway for the driver to then and there attempt to remedy the same. His attempting to do so is not in itself contributory negligence. It becomes a question of fact for the jury to determine whether or not he used due care in this process under all of the facts and circumstances.

In **Dare v. Boss**, *supra*, at page 195 the Court describes the situation as follows:

"The plaintiff's testimony is to the effect that one of the front tires of his car was so flattened as a result of the puncture that it would have been dangerous for him to have driven further with it in that condition and that he stopped his car as far off the road as appeared same to him;"

Upon page 197 the Court cited the statute then in effect which read as follows:

"No vehicle shall be parked upon the main-traveled portion of the highways of this state; provided, that this shall not apply to any vehicle so disabled as to prohibit the moving of the same."

The Court says of this statute upon page 198:

"The 'rule of reason' applies here, and if it should have appeared to the jury that he could have moved the car safely he would have been guilty of contributory negligence in failing to do so, but unless the testimony is uncontradicted the court should not hold that stopping to repair a temporary disability is contributory negligence as a matter of law . . ."

In **Martin v. Oregon Stages**, *supra*, the Court, speaking of the same statutory language as set forth in **Dare v. Boss**, states as follows upon page 441:

"The proviso cannot be applied in all cases literally. The words 'so disabled as to prohibit' does not necessarily indicate that the vehicle could not be moved but that it would be unsafe to move in under the conditions existing at the place and time . . ."

Upon page 443 the Court states:

"From these authorities we hold that this court is committed to the rule that the jury is the judge of the question as to whether or not the truck driven by plaintiff was actually parked in the technical sense of that word as used in our statute. If the truck was standing partially on the traveled portion of the highway because of a necessity for some temporary repair and the driver was engaged in making the necessary repair, then plaintiff was not guilty of contributory negligence in that regard . . ."

Upon page 444:

"The conduct of the plaintiff just before and at

the time of the accident must be judged by the appearances and conditions at the time. The fact that plaintiff could have driven his truck entirely off the traveled portion of the highway a few feet farther along, if that is a fact, does not necessarily require the court to hold that plaintiff was guilty of contributory negligence by stopping where he did. If he did what a reasonably prudent man would have done under the circumstances, we cannot say as a matter of law that he is guilty of contributory negligence."

In **Holman v. Uglow**, *supra*, plaintiff was injured while pushing a vehicle disabled by its being out of gas. At the place where the vehicle ran out of gas there was a six foot wide, but ungraveled, shoulder, but there was a heavy rain and plaintiff and his companions feared that the vehicle would sink into the mud if pushed off the road at that place. They were therefore engaged in pushing the automobile to a spot approximately 450 feet ahead where it could be parked on a graveled area when defendant struck them. Upon page 365 the Court states:

"An automobilist who exercises due care may in an emergency use a portion of the roadway for making necessary inspections of his car, raising the top, making needed repairs, or for the performance of other acts rendered necessary by the inability of his car to proceed. Such actions, being incidental to travel, are regarded as a proper use of the highway: **Martin v. Oregon Stages**, 129 Or. 435 (277 P. 291); **Dare v. Boss**, 111 Or. 190 (224

P. 646); **Deitchler v. Ball**, 99 Wash. 483 (170 P. 123); **Schacht v. Quick**, 178 Wis. 330 (190 N.W. 87, 25 A.L.R. 130); 42 C.J. title Motor Vehicles, p. 1041, Sec. 791. Hence, the conduct of the deceased in pushing the automobile along the highway when its supply of fuel had become exhausted could properly be regarded as a legitimate use of the road."

"The Federal Supreme Court, and also this court, recently reiterated the rule that when fair-minded men can honestly disagree upon the question whether a given set of facts reveals negligence or the exercise of due care, the question is not one of law but of fact for settlement by the jury: **Gunning v. Cooley**, 281 U.S. 90 (74 L. Ed. 720, 50 Sup. Ct. 231); and **Ford v. Schall**, 114 Or. 688 (236 P. 745)."

Upon page 366:

"Coming now to the second subdivision of the contention, the rule which governed the three young men in their conduct while shoving the car ahead was the much reiterated, platitudinous rule that they were bound to employ reasonable care. This simple formula is easier of statement than of application, but generally in instances of this kind the application of the rule is for the jury and not for the court."

In **Morris v. Fitzwater**, *supra*, the plaintiff and her husband were driving along the highway when without warning her lights went out. She steered the car over to the right side of the highway and brought it

to a stop. Plaintiff remained in the driver's seat while the husband got out to investigate the reason for the lights having failed. At this point defendant's vehicle collided into the plaintiff's vehicle from the rear. The question of plaintiff's conduct was one for the jury.

The "analogous" case of **Borgert v. Spurling**, 191 Or. 344, 230 P. 2d 183, cited by defendants—in fact supports plaintiff's position.

The accident involved three automobiles. The first was the Potterf car in which plaintiff was a passenger and which ran out of gas and was pulled off the highway at a point where the shoulder was approximately three and a half feet wide. The second was the Fox vehicle which parked along side the Potterf vehicle but on the highway and faced in the wrong direction. With the two vehicles in this position gasoline was being siphoned from the Fox vehicle into a hubcap for the purpose of pouring the same into the Potterf vehicle. At this point the third vehicle, that of the defendant Spurling, came upon the scene and struck and injured plaintiff. The plaintiff brought action against both Spurling and Fox, alleging as to Fox that he violated the parking statute and that this was a proximate cause of his injury. The Fox car was clearly parked in violation of the statute and the Court held that the plaintiff concurred in this negligence as a means of getting the Potterf car, in which he was a

passenger, on its way again. The Court clearly distinguishes the unusual situation.

Upon page 351 the Court states:

"Defendant Spurling charged that the Potterf car was parked in violation of these provisions. But the car was disabled, and there is evidence that it was moved as far off the pavement as possible and that, before the Fox car was parked alongside it, more than 16 feet of unobstructed highway was left for the passage of other vehicles. In these circumstances, under our decisions, the question whether the car was parked in violation of the statute was a question for the jury. **Morris v. Fitzwater**, 187 Or. 191, 197, 210 P. 2d 104; **Hornshuh v. Aildredge**, 149 Or. 419, 424, 41 P. 2d 423; **Holman v. Uglow**, 137 Or. 358, 366, 3 P. 2d 120; **Martin v. Oregon Motor Stages, Inc.**, 129 Or. 435, 441, 277 P. 291; **Dare v. Boss**, 111 Or. 190, 197, 224 P. 646. Had the Fox car never come upon the scene, and had the plaintiff been injured while engaged about the rear of the Potterf car in making some necessary repair or filling the gasoline tank, we would have had an entirely different case than the one actually presented, a case more like **Martin v. Oregon States, Inc.**, and **Holman v. Uglow**, in which the question of contributory negligence was held to be for the jury. And see Annotation, 61 A.L.R. 1164."

"Alvin Fox clearly violated the parking statute. His car was not disabled, and, Good Samaritan though he was, his generous impulses afforded him no exemption from the statute's command. As previously stated, the two cars completely

blocked the passage of vehicular traffic on the east half of the road, and, even accepting plaintiff's measurements, less than 16 feet of unobstructed highway was left opposite the Fox car . . ."

"The evidence in some respects is too indefinite and uncertain to permit us to say that the plaintiff had or exercised any such control over the movement of the Fox car, that he could be held legally responsible for the illegal and negligent act of Alvin Fox or for the dangerous situation created by the juxtaposition of the two cars. But the plaintiff knew, or should have known, of the dangerous situation, and he accepted it as the means through which the Potterf car might be gotten on its way again. And it is conclusively established for the purposes of this case, not only that Alvin Fox, as alleged in the complaint, parked his car 'in the center of said county road' but that this was an act of negligence which was a proximate cause of plaintiff's injury. As stated in IV Wigmore, Evidence (3d ed.) 45, Sec. 1064, 'The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admission . . . but judicial admissions . . .; i.e. they are not means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues.'"

"In these circumstances, it might well be urged that the plaintiff was guilty of negligence in undertaking at all to busy himself about the rear of the Potterf car." (Emphasis added).

There is no case in which the Oregon Supreme Court has held that as a matter of law one whose vehicle has

been disabled on the highway is guilty of contributory negligence in attempting to remedy that defect while vehicle is in that position. To the contrary, in each instance that Court has held that both whether or not the vehicle was disabled and the reasonableness of the conduct of the plaintiff in attempting to remedy the defect, are questions of fact for the jury.

This embraces defendants charge that plaintiff failed to keep a lookout. What amount of lookout a reasonably prudent person could have or would have maintained under all the facts and circumstances including the task to be accomplished, the obvious visibility of his automobile, that he could assume others would obey the law and use due care, etc., is to be determined by the jury.

(3) A separate theory of "assumption of risk" is not applicable in this cause.

Whatever conduct upon the part of plaintiff the defendants are urging under this separate theory of "assumption of risk" is well embraced within their plea of contributory negligence.

It is hornbrook law that the doctrine of assumption of risk, as the phrase is used by the authorities to designate a specific rule of law, is applied to occupations and activities that of common knowledge involve inherent danger and in which an intelligent choice to engage in the same necessarily includes a conscious

acceptance of those risks for the benefits or pleasures to be gained. (65 C.J.S. Negligence, Sec. 17, p. 848). As applied under the common law to the servant who accepts hazardous employment or to the injured football player who engages in vigorous play or to the spectator of a baseball game who has reason to expect foul balls, the doctrine so described is in accord with human experience.

But to say that one who is changing a flat tire and is injured by the outright negligence of another is absolutely barred from recovery because of his "assumption of the risk" of being out of his car and in that awkward position is as sensible as saying that one who drives an automobile and is injured in an accident clearly the other driver's fault is absolutely barred from recovery by his "assumption of the risk" of driving.

Specifically as to the case at bar, the Oregon Supreme Court has held under similar fact situations that the issue of contributory negligence is for the jury to determine. It has **not** held that there can be no such issue because the driver assumes the risk of whatever occurs to him when he places himself upon the highway for the purpose of attempting to solve the disability of his vehicle.

B. There was substantial evidence that defendant was guilty of negligence.

Since this is the subject of appellant's opening brief, appellant will not belabor the point here.

Admittedly, mere skidding alone is no indication of negligence, but mere skidding alone—indeed “skidding”—is not the charge against defendants in this cause.

The fact is that defendant's trailer did not skid—it **slid**. The icy condition of the road was not a latent factor that occasioned the chance misfortune of an unexplained skid of an automobile or truck.

This is a case of deliberate choice to travel at right angles across a steeply inclined plane, obviously slippery enough to disable other vehicles, with a jointed vehicle, the second half of which, being without its own motive power was free to slide down the incline unless the first half was drawn at such speed and in such direction as to make the second half follow dead in its tracks. The defendants simply failed in the task they deliberately undertook, to maintain control of the trailer so that it wouldn't slide down into plaintiff. This was negligence.

It is respectfully submitted that the judgment order of the trial court should be reversed.

Respectfully submitted,

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Attorney for Appellant.

No. 15328

United States
Court of Appeals
for the Ninth Circuit

RALPH F. STALLMAN, Appellant,

vs.

CASEY BEARING COMPANY, INC., a corporation, and T. W. CROSBY, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages I to 284, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division.

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In the United States District Court, Northern District of California, Southern Division

Civil Action No. 33567

RALPH F. STALLMAN, Plaintiff,

vs.

CASEY BEARING COMPANY, INC., a corporation, T. W. CROSBY, MCGILL MANUFACTURING CO., a corporation, A CORPORATION, JOHN DOE and RICHARD ROE, Defendants.

COMPLAINT FOR PATENT
INFRINGEMENT

Plaintiff for cause of action against defendants alleges:

I.

Plaintiff Ralph F. Stallman is a resident of the City of Oakland, County of Alameda, State of California.

II.

Defendant Casey Bearing Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business in San Francisco, California.

III.

Defendant T. W. Crosby is a resident of Sausalito, Marin County, State of California, and is an

agent and representative of the defendant McGill Manufacturing Company in the State of California.

IV.

McGill Manufacturing Company is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and has been qualified to do business in the State of California and has an established place of business in this district.

V.

The names of the defendants sued herein by fictitious names are at present unknown to plaintiff and leave is asked to insert their true names when the same are ascertained.

VI.

This cause of action arises under the patent laws of the United States, Title 35 U.S. Code, and jurisdiction is founded upon Title 28 U.S. Code Section 1338 (A). As to venue, defendants Casey Bearing Company, Inc., and T. W. Crosby are residents of the Northern District of California, said T. W. Crosby is also an Agent and Representative of defendant McGill Manufacturing Co. and all have regular and established places of business in said district and have committed acts of infringement.

VII.

On November 16, 1943, U. S. Letters Patent No. 2,334,227 were duly and legally issued to Ralph F. Stallman for an invention in Needle Bearings.

VIII.

Defendants, and each of them, have been for a long time and within six (6) years last past and prior to the filing of this Complaint, and still are individually and jointly infringing said Letters Patent by manufacturing, using and selling needle bearings embodying said patent and invention in this district and elsewhere in knowing, wanton and deliberate disregard of the rights of plaintiff in the premises.

IX.

Plaintiff has placed the required statutory notice on needle bearings manufactured and sold under said Letters Patent, and has given written notice to the defendants, and each of them, of said infringement.

X.

Plaintiff has been damaged by the infringing acts of defendants, and each of them, in an amount unknown to plaintiff, and plaintiff is informed and believes, and on information alleges that said damage is in excess of Three Thousand Dollars (\$3,000.00).

Wherefore, plaintiff prays for damages from the defendants in the amount of ten (10%) per cent of the sales price of each needle bearing manufactured and sold by defendants, and each of them, that is an infringement of said Letters Patent No. 2,334,227.

That plaintiff have judgment against the defendants, and each of them, for reasonable attorneys fees incurred by plaintiff in this action.

That plaintiff have judgment against the defendants for his costs and disbursements herein, and for such other and different relief as this Court may deem meet and proper in the premises.

That the said damages as found hereunder be trebled.

/s/ RALPH F. STALLMAN,
Plaintiff

/s/ ALBERT D. ELLEDGE,
/s/ GEORGE B. WHITE,
Attorneys for Plaintiff

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

ANSWER

Now Come the defendants Casey Bearing Company, Inc., and T. W. Crosby, and answering the complaint only for themselves and only as to those allegations pertaining to them, the above-entitled action having been dismissed as to McGill Manufacturing Co. on August 9, 1954, state:

I.

Defendants admit the allegations of Paragraph I of the complaint.

II.

Defendants admit the allegations of Paragraph II of the complaint.

III.

For answer to Paragraph III of the complaint, defendants admit the allegation of residence of T.

W. Crosby, but deny the remaining allegations of said paragraph.

IV.

For answer to Paragraph VI of the complaint, defendants admit the allegations therein of jurisdiction, and of residence for such defendants, but deny the remaining allegations of said paragraph.

V.

For answer to Paragraph VII of the complaint, defendants admit that United States Letters Patent No. 2,334,227 issued on November 16, 1943, but deny the remaining allegations of said paragraph.

VI.

For answer to Paragraph VIII of the complaint, defendants deny each and every allegation of said paragraph.

VII.

For answer to Paragraph IX, defendants admit receipt of a written notice of the aforesaid Letters Patent from plaintiff, but deny each and every other allegation of said paragraph.

VIII.

For answer to Paragraph X of the complaint, defendants deny that they have individually or otherwise infringed Letters Patent No. 2,334,227 at any time since the issuance of such patent and that plaintiff has been damaged by any acts of defendants.

IX.

Defendants, further answering, aver that said Letters Patent No. 2,334,227 are invalid and void for the following reasons:

(a) Because prior to the alleged invention in said Letters Patent, or more than one year prior to the application for said Letters Patent, the alleged invention had been patented or described in the following patents and printed publication:

United States Patents

Pat. No.—Patentee—Date Issued

58,109—H. M. LeDuc—September 18, 1866.
 129,256—R. W. Smith—July 16, 1872.
 388,238—D. Allen—August 21, 1888.
 496,346—D. W. Copeland—April 25, 1893.
 585,580—D. E. Kempster—June 29, 1897.
 683,408—D. E. Kempster—September 24, 1901.
 747,324—D. E. Kempster—December 15, 1903.
 779,403—D. Allen—January 10, 1905.
 802,362—J. M. Green, et al.—October 17, 1905.
 839,084—W. T. Fleming, December 18, 1906.
 849,094—O. F. Zahn—April 2, 1907.

Foreign Patents

Br. 10,116—D. E. Kempster—August 3, 1901.
 Fr. 370,821—O. F. Zahn—February 20, 1907.

Publication

The Wälzlager, by Wilhelm Jürgensmeyer, published by Julius Springer in Berlin, 1937, pages 23 and 24;

as well as in other patents and printed publications in this and in other countries.

(b) Because prior to the making of the alleged invention of said Letters Patent, said alleged invention had been known to and used by others in the United States, to wit: by the several patentees

of the United States Letters Patent listed in sub-section (a) hereof, and by the author of the publication listed in sub-section (a) hereof, as well as by others.

(c) Because the applicant for said Letters Patent, the plaintiff herein, was not the original or first inventor or discoverer of the alleged invention purporting to be patented therein, but it had previously been devised by others who had not abandoned, suppressed, or concealed the same, to wit, persons identified in sub-section (b) hereof, as well as by others.

(d) Because any differences between the subject matter sought to be patented by said Letters Patent and the prior art are such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which said subject matter pertains.

(e) Because the specification of said Letters Patent does not contain a written description of the alleged invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains to make and use the same.

(f) Because during the prosecution of the application for said Letters Patent, substantial and material alterations were made in the statement and claims of invention for which no supporting oath of the applicant was provided.

(g) Because of unreasonable delay and failure to disclaim claims of said Letters Patent which are invalid and the invalidity of which the plaintiff has had notice and knowledge for many years.

X.

Further answering, defendants aver that the plaintiff is estopped by the proceedings in the United States Patent Office in the matter of his application for said Letters Patent No. 2,334,227 and the acquiescence of said applicant in and to the rulings and rejections of the Commissioner of Patents in the negotiations for said Letters Patent, and in and by the limitations imposed thereby during the negotiations in the United States Patent Office leading up to the grant and issuance of said Letters Patent, from claiming any scope or subject matter of said alleged Letters Patent or any of the claims thereof as would comprehend or embrace any apparatus sold, offered for sale, or used by defendants.

XI.

Further answering, defendants aver that they have not committed any act of infringement of said Letters Patent No. 2,334,227 or any of the claims thereof.

XII.

Further answering, defendants aver that said Letters Patent No. 2,334,227 were issued by the United States Patent Office without due investigation, and that an important part of the relevant prior art was not cited by the Patent Office, and that other parts of said prior art were improperly

applied and construed, and that the Commissioner of Patents exceeded his legal authority in granting the aforesaid Letters Patent and they are, therefore, void and of no effect.

Wherefore, defendants pray:

(A) That the complaint herein be dismissed;

(B) That the cost of this suit be taxed against the plaintiff;

(C) That defendants be awarded reasonable attorneys' fees;

(D) That the defendants have such other and further relief as to this Court may seem just and as the circumstances warrant.

Dated: September 8, 1954.

CASEY BEARING COMPANY,
INC., a corporation,
T. W. CROSBY,
Defendants

By NAYLOR & LASSAGNE,
JAS. M. NAYLOR
MUELLER & AICHELE,
FOORMAN L. MUELLER,

/s/ By JAS. M. NAYLOR

Attorneys for Defendants

Affidavit of Mailing attached.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF ADDITIONAL
PRIOR ART TO BE RELIED UPON AT
THE TRIAL

To plaintiff above named and to George B. White,
Esq., and Albert D. Elledge, Esq., his attor-
neys:

Please take notice, pursuant to Title 35, United States Code, Sec. 282 (4), that at the trial of this cause defendants will rely upon the following additional patents as anticipations of the patent in suit or to show the state of the art and for the purposes specified in Paragraph IX (a) and (b) of defendants' Answer on file therein:

United States Patents

223,802—E. D. Draper—Issued Jan. 27, 1880.

892,866—E. Moonen—Issued July 7, 1908.

1,018,324—D. E. Kempster—Issued Feb. 20, 1912.

1,080,288—C. S. Lockwood—Issued Dec. 2, 1913.

1,257,597—H. Gallet—Issued Feb. 26, 1918.

1,510,920—W. S. Bronander—Issued Oct. 7, 1924.

1,885,914—L. R. Heim—Issued Nov. 1, 1932.

1,979,707—P. W. Rydbeck—Issued Nov. 6, 1934.

British Patent

17,841 of 1906—Oswald Francis Zahn—Issued Jan.
10, 1907.

German Patent

189,566—Oswald Francis Zahn—Issued Aug. 11,
1906.

Canadian Patent

107,172—Oswald Francis Zahn—Issued Aug. 27,
1907.

French Patent

466,595—Perosa—Issued May 16, 1914.

NAYLOR & NEAL,

JAS. M. NAYLOR,

/s/ By JAS. M. NAYLOR,

Attorneys for Defendants

Certificate of Service attached.

[Endorsed]: Filed March 13, 1956.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the plaintiff and determine that the Stallman Patent No. 2,334,227 is valid and infringed by the defendant as to Claims Nos. 3, 4, 5, 9.

We find damages against defendant Casey Bearing Company, Inc., et al., in the sum of \$3,683.51, which is 10 per cent of \$36,835.18, the total price of Guiderol Bearings which have been stipulated to have been sold by said defendants.

/s/ FREDERICK A. WEBSTER, JR.,
Foreman

Filed April 23, 1956, at 4 o'clock and 30 minutes p.m. C. W. Calbreath, Clerk, by Edward C. Even-
sen, Deputy Clerk.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

JUDGMENT ON VERDICT

This cause having come on regularly for trial on April 18, 1956, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; and George B. White, Esq., and Albert D. Elledge, Esq., appearing as attorneys for the plaintiff, and James M. Naylor, Esq., and Foorman L. Mueller, Esq., appearing as attorneys for the defendants, and the trial having been proceeded with on April 18, 19, 20, 23, 1956, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz.:

“We, the Jury, find in favor the plaintiff and determine that the Stallman Patent No. 2,334,227 is valid and infringed by the defendant as to Claims Nos. 3, 4, 5, 9.

We find damages against defendant Casey Bearing Company, Inc., et al., in the sum of \$3,683.51, which is 10 per cent of \$36,835.18, the total price of Guiderol Bearings which have been stipulated to have been sold by said defendants.

Frederick A. Webster, Jr.,
Foreman,”

and the Court having ordered that judgment be en-

tered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant Casey Bearing Company, Inc., the sum of \$3,683.51, together with.... costs herein expended taxed at \$.....

Dated: April 24th, 1956.

/s/ C. W. CALBREATH,
Clerk

Entered in Civil Docket April 25, 1956.

[Endorsed]: Filed April 24, 1956.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT AND
MOTION FOR NEW TRIAL

Defendant, Casey Bearing Company, Inc., moves the Court to set aside the verdict and judgment heretofore entered in the above-entitled action and to enter judgment in favor of the defendant in accordance with its motion for a directed verdict made at the close of all of the evidence, and upon the additional grounds;

1. That the patent in suit does not provide a written description of the alleged invention in the clear, concise, and exact terms as required by the

patent statutes, nor do the claims meet the requirements of such statutes;

2. That the evidence in this case does not support the jury's verdict that the patent in suit is valid and infringed; and

3. That the award of damages to plaintiff in the amount of \$3,683.51 is improper and unjust.

In the alternative, defendant moves the Court for a new trial.

As grounds for such two motions defendant presents the following reasons:

1. Claims 3, 4, 5 and 9 of the Patent in Suit are invalid as anticipated by the prior art and lacking invention thereover.

35 USC 112

Atlantic Works vs. Edwin L. Brady, 107 U.S. 192 (1883).

Great A & P Tea Co. vs. Supermarket Equipment Corp. 340 U.S. 147 (1950).

Upright Inc. vs. Patent Scaffolding Co., 108 USPQ 24 CA9 (1955); and (135 F. Supp. 813, 1954).

Kwikset Locks vs. Hillgren, 210 F(2d) 483, CA9 (1954).

Himes et al. vs. Chadwick, 199 F(2d) 100, CA9 (1952).

Jacuzzi Bros. Inc. vs. Berkeley Pump Co., et al, 191, F(2d) 632, CA9 (1951).

Gomez, et al. vs. Granat Bros., et al., 177 F(2d)
266 CA9 (1949).

(a) Claim 9 is the broadest and reads word for word upon Kempster U. S. Patent No. 585,580 of June 29, 1897, as demonstrated in the following reproduction of the chart Def's. Ex. V. This Kempster patent was not cited by the Patent Office.

1. The first part of the paper is devoted to a general discussion of the problem.

2. The second part is devoted to a detailed analysis of the results obtained in the first part.

3. The third part is devoted to a discussion of the results obtained in the second part.

bearing comprising

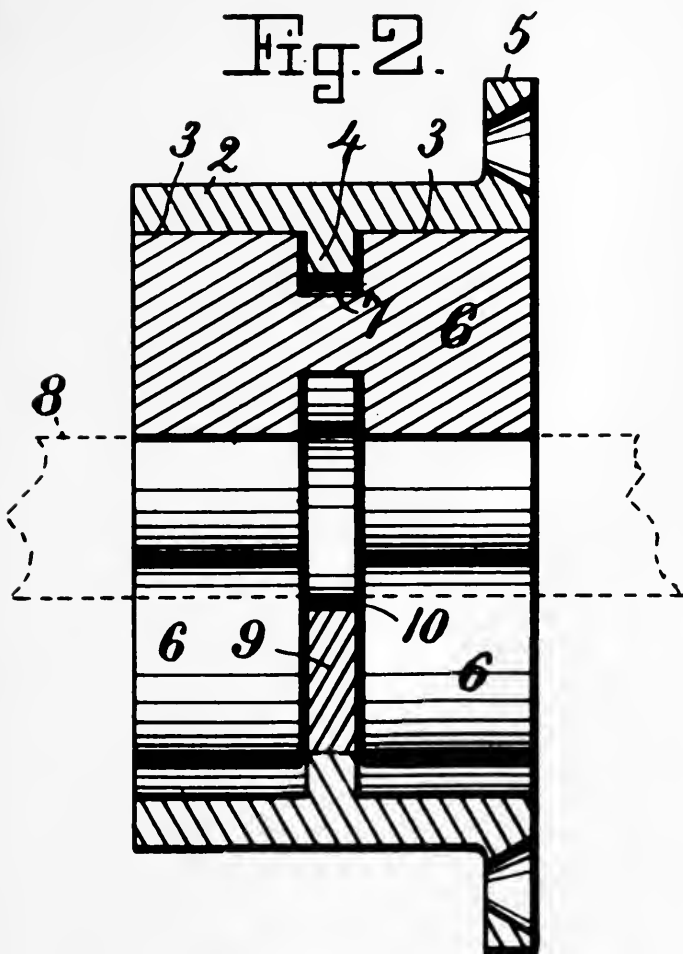
a cylindrical inner race (8) and

an outer race (3 on 2),

a plurality of rolls (6) having reduced portions (7) intermediate their ends interposed between said races,

a ring (4) carried by the outer race and registering within the reduced portion of the rolls to engage the rolls in the event they become misaligned with their normal position and

a second ring (10) contained by said reduced portions of the rolls adjacent the inner race to retain the rolls in place against the outer race when the races are separated.





(1) In addition there are the Heim (1,885,914) and Rydbeck (1,979,707) patents cited by the Patent Office.

(2) With respect to limitations in claims 3, 4 and 5 which are more specific than those in claim 9, the prior art in addition to Kempster 585,580 is similarly anticipatory.

(3) The guide rail on the stationary outer race only is shown in the Zahn British patent No. 17,841 of 1906, and there are numerous other examples of a roller bearing with a stationary guide rail in the patents in the prior art (Def's. Ex. O) not cited by the Patent Office.

(b) The function and the operation for his bearing as specifically called for by plaintiff whether in his patent, the file wrapper (Def's. Ex. A), or in his testimony, are described substantially in plaintiff's own language in the following prior patents (Def's. Ex. O), none of which were considered by the Patent Office:

Zahn, British, 17,841 of 1906 (pg. 1)

Zahn, U. S., 849,094 of 1907 (pgs. 1 and 2)

Zahn, German, 189,566 of 1906 (pgs. 1 to 3 of translation)

Zahn, French, 370,821 of 1907 (pgs. 2 and 3 of translation)

Zahn, Canadian, 107,172 of 1907 (pgs. 1, 4, 12, 13 and 14 of specification)

(c) The specification and claims of the patent in suit do not describe and claim the alleged invention

of the Stallman patent with the particularity required by the patents statutes.

(1) The plaintiff testified that his alleged invention was a combination of old elements wherein the guide rail was placed on the stationary race only of the bearing. However, in no place in the entire specification is the alleged invention so described, and the word "stationary" appears only once (page 2, column 1, line 30) in the entire two pages of specification, and then on the basis that it was a "preferred" position rather than that it must be there.

(2) Plaintiff represented during the prosecution of the application (File wrapper Def's. Ex. A pps. 18, 25, 26) in the Patent Office that the bearing would fail unless the rail was so placed, and the testimony given by plaintiff during the trial was to the same effect.

2. Defendant has not infringed any of the four claims in suit of the Stallman patent.

The Keystone Bridge Company vs. The Phoenix Iron Co., 95 U.S. 344, (1877)

D & H Electric Co. vs. M. Stephens Mfg. Inc. et al, 108 USPQ 27, CA9 (1955)

McRoskey vs. Braun Mattress Co., 107 F(2d) 143, CA9 (1939)

Magnavox Co. vs. Hart & Reno et al, 73 F(2d) 433, CA9 (1934)

(a) Plaintiff charging direct infringement in the bill of complaint, did not apply his patent claims

nor in any way discharge his burden which compels him to prove that the Guiderol bearings sold by defendant come within claims 3, 4, 5 and 9 of the patent.

(b) Each claim defines a bearing with an inner and an outer race. Pltf's Ex. 5A, as his example of an alleged infringing bearing has only the outer race, and the corresponding Def's. Ex. I of a smaller size was offered in evidence by defendant, without objection by plaintiff, as representative of Guiderol bearings charged to infringe.

(c) Claims 3, 4, 5 in suit call not only for an inner and outer race in the bearing, but call for "rotatable," "revolving," and "stationary" races, and the unrefuted testimony upon behalf of defendant shows that in most cases, if not all cases, the salesman does not know how the bearing purchased by defendant's customer is to be installed.

(d) Plaintiff testified (Tr. p. 91) that a roller bearing with a race ring, rollers therein, and a guide rail on the race ring fitting into recesses in the rollers was not his bearing if it did not cancel skewing.

(e) The plaintiff obtained his patent including the four claims in suit on the unqualified representation to the Patent Office that the successful operation of his bearing required that the guide rail of the bearing be on the stationary race, and the unrefuted testimony of defendant's vice president was that the defendant's bearings operated

equally well whether the guide rail was on the stationary or upon the rotating race of the bearing. Such unqualified representation by plaintiff cannot be ignored in the consideration of infringement of the four claims in suit.

(f) By reason of the state of the art, and by reason of plaintiff's representations to the Patent Office, claims 3, 4, 5 and 9 of the Stallman patent in suit, are invalid, but if not invalid, must be so narrowly construed that they are not infringed by defendant's Guiderol bearing.

3. The evidence does not support the Verdict of the Jury.

(a) Plaintiff did not discharge his burden insofar as proof of infringement of the claims in suit is concerned. Furthermore, he put in no testimony whatsoever in rebuttal of defendant's clear evidence by testimony, by charts, and by models, that every element and all functions contended for by plaintiff to comprise his patented bearing are in the prior art. Accordingly, the verdict of the jury is contrary to the clear weight of the evidence against infringement, and against the equally clear showing of invalidity of the claims of the Stallman patent in suit.

(b) Defendant's tests and testimony during trial refute plaintiff's theory of operation that his bearing structure and positioning of the guide rail cancels skewing of rollers in the bearing.

(1) Actual demonstrations of the defendant's

bearing viewed by a stroboscopic light showed conclusively that the rollers skew in a bearing where the races are misaligned, and stay skewed during the operation of that bearing.

(2) Plaintiff did not demonstrate accurately the action of a roller when using the straight board with guide rail, and in his Exhibit 5 demonstration, he did not make the rollers visible in the Guiderol bearing in order to try to show that skewing was actually cancelled.

(3) Examination of the Guiderol bearings Pltf's. Ex. 5A, and Def's. Ex. I, show that there is insufficient clearance between rollers packed into the outer race ring to permit skewing and then cancelling of that skewing in each roller, as plaintiff insists will happen.

(4) Furthermore, defendant's witness testified that satisfactory bearing operation was obtained in thousands of installations irrespective of whether the guide rail was on the stationary or upon the rotating race of the bearing installation, all contrary to the representations made by plaintiff both in the Patent Office and during trial.

4. The award of damages on the basis of a 10% royalty of the selling price of Defendant's bearing is not supported by the evidence, and in fact invalidity and non-infringement being shown, no damages should be awarded.

(a) Plaintiff's Exhibits 11 and 12 which plain-

tiff relied upon in contending for a 10% royalty were referred to as "commission statements" during plaintiff's testimony and when offered in evidence (Tr. pps. 57, 58, 59, 60 and 61). In addition to plaintiff's own testimony, the documentary evidence, Def's. Ex. H, shows clearly that the 10% was paid to plaintiff as a commission on certain sales made during the period of the temporary arrangement, and that the 10% was not considered by either the plaintiff or McGill Manufacturing Co., Inc. who paid the sales commission, to be a royalty such as would be paid under a patent license.

(b) Absent proof of infringement of the claims in suit, plaintiff is not entitled to any accounting of damages, the amount of defendant's sales of Guiderol bearings being incorporated in the stipulation subject to defendant's objection to admissibility of such evidence prior to a determination of validity and infringement of the Stallman patent in suit (Stipulation of April 12, and Tr. p. 151).

(c) Defendant's commission on sales of McGill Manufacturing Co. Inc., are in no way involved in the present action, for on August 9, 1954, this action was dismissed for want of jurisdiction as to McGill.

(1) Even if the plaintiff's patent was held valid, and was held to be infringed by defendant's sales of Guiderol bearings, defendant can in no way be held responsible for McGill's sales. Absolute proof of this resides in fact that T. W. Crosby was orig-

inally served for McGill, for himself, and for Casey Bearing Co., and the summons was quashed as to such attempted service on McGill, so that at this time Casey Bearing Company Inc., cannot be held responsible for such sales.

(2) The unrefuted testimony of defendant's vice president was that even as to McGill's sales of Guiderol bearings, such bearings were generally sold only with an outer race assembly, and bearings were installed with the guide rail on the rotating or revolving race of the installation, contrary to the claims of the Stallman patent and plaintiff's own representation as to the operation of his bearing.

(3) The dismissal of the suit against McGill Manufacturing Co. Inc., also emphasizes that plaintiff as early as August 9, 1954, was unable to show that T. W. Crosby was an agent for service on McGill and yet plaintiff retained him as party defendant up to the time of the granting on April 20, 1956, of defendant's motion on to dismiss as to said Crosby.

Conclusion

A judgment notwithstanding the verdict of the jury should be granted upon the present motion as entirely justifiable, for the interpretation of patent claims and questions concerning invalidity involve legal questions which are reviewable by the trial judge.

Therefore, the verdict of the jury and the judgment entered thereon should be set aside, or in the

alternative, a new trial should be granted to defendant for the reasons set forth herein.

/s/ JAS. M. NAYLOR,
NAYLOR & NEAL,

/s/ FOORMAN L. MUELLER,
MUELLER & AICHELE,

Attorneys for Defendant

May 1, 1956.

[Title of District Court and Cause.]

ORDER ON MOTION FOR JUDGMENT NOT-
WITHSTANDING VERDICT AND IN AL-
TERNATIVE FOR NEW TRIAL

This cause came on to be heard on the motion by defendant to set aside the verdict and judgment herein, and for an order directing judgment to be entered in accordance with its motion for a directed verdict heretofore made in this action, or in the alternative for a new trial, the Court having considered the written briefs and oral arguments of the parties, and it appearing to the Court that the motion for a directed verdict should have been granted on the ground that the claims of the Stallman patent No. 2,334,227 in suit are, as a matter of law, invalid and not infringed, and that a new trial should be granted in the alternative, it is

Ordered, that the motion to set aside the verdict and judgment and for judgment in accordance with defendant's motion for a directed verdict be granted, and that a judgment be entered for de-

defendant dismissing the action, with costs, and with reasonable attorney's fees in the amount of....., and it is further

Ordered, that the motion for a new trial be granted on the ground that the verdict is against the weight of evidence, provided the order herein for judgment notwithstanding the verdict is reversed on appeal.

Dated:, 1956.

.....,

United States District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

OPINION UPON MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Albert D. Elledge and George B. White, Attorneys for Plaintiff; Naylor & Neal, Jas. M. Naylor, Mueller & Aichele, Foorman L. Mueller, Attorneys for Defendant.

Goodman, District Judge.

This patent infringement suit was tried before a jury. Upon the conclusion of the evidence, defendant moved for a directed verdict in its favor on the ground that the claims in suit were invalid as a matter of law. Believing that the question tendered by the motion warranted a careful study which could more conveniently be made, if necessary, upon a motion for judgment notwithstanding the

verdict, the Court denied the motion for a directed verdict and submitted the cause to the jury. The jury returned a verdict that the four claims in suit were valid and infringed. Defendant thereupon moved for judgment notwithstanding the verdict. An appraisal of the entire record in the light of the oral and written arguments upon the motion, compels the conclusion that the claims in suit are invalid as a matter of law and that the verdict must be set aside and judgment entered for defendant.

The patent in suit, No. 2,334,227, is a combination patent for a roller bearing.¹ Plaintiff's bearing has the basic components common to all roller bearings—two concentric cylindrical races and a number of rollers resting in and substantially filling the space between the races. The significant feature of plaintiff's bearing is the means employed to prevent endwise movement of the rollers and thus confine them in place between the races. Commonly, endwise movement of the rollers is prevented by providing one of the races with a flange at each end. Plaintiff prevents endwise movement of the rollers by providing one of the races with a central rib which projects into a groove indented into the middle of and circumscribing each roller. This central guide rib may be formed as an integral part of the race or may consist of a separate ring resting in a

¹ Although the specification of plaintiff's patent described his bearing structure as particularly suitable when rollers of the needle type are to be employed in the bearing, it states that the structure is equally adaptable to rollers of all dimensions.

groove in the race of lesser depth than the thickness of the ring.

The use of a central guide rib to hold the rollers in position affords a number of advantages. The controversy regarding the validity of plaintiff's patent centers around one of these advantages, to-wit, the ability of the central guide rib to correct any tendency of the rollers to skew. Skewing means the misalignment of a roller with its axis of rotation when the bearing is in operation. Skewing results when, because of a greater load pressure on one portion of the bearing than another, the forward movement of one end of a roller is retarded while the other end moves ahead. In the ordinary roller bearing having a flange at each end of one of the races to maintain the rollers in position, the flanges will limit the degree of misalignment of the rollers, if they skew. But there is no means to restore them to proper alignment. So long as the load pressure on the bearing remains unequal, the skewing will continue and the misalignment may become so pronounced as to produce destructive heat and friction.

If a roller which is held in position by a central guide rib skews, the shoulder of the roller's central groove, which is nearest the forward end of the roller, will contact the guide rib. Sufficient friction will be produced at the point of contact to retard the movement of the forward end of the roller permitting the other end to catch up. The roller will thus be immediately restored to proper alignment. In order that the central guide rib may function in this manner to correct skewing, it must be placed

on only one race and that race must be the one which is stationary when the bearing is in operation.²

Plaintiff was not the first to employ a central guide rib on one of the races of a roller bearing to maintain the rollers in position. United States patents No. 1,885,914, to Heim, and No. 585,580 to Kempster, both describe a roller bearing having a central rib on its outer race projecting into a central groove in the rollers to maintain them in position. United States patent No. 747,324, to Kempster, claims a central guide rib on both the inner and outer races. A variation of this construction wherein only the inner race is provided with the central guide rib is suggested by the specification of this patent and illustrated in figures 4 and 5 of the drawings.³ These three prior art patents do not claim the correction of skewing as one of the ad-

² Whether the central guide rib actually functions in the above-described manner to correct skewing, and, if it does so, whether its placement on the stationary race of the bearing is essential to this function, were both vigorously contested issues of fact at the trial. For purposes of the present motion, the facts are taken to be in accordance with the contentions of plaintiff.

³ The structure of the Heim bearing differs from that of plaintiff's bearing in that the outer race of the Heim bearing is formed in two sections arranged in alignment. But, this feature is for convenience of manufacture, and is obviously not necessary for the operation of the bearing. The claims of Kempster patent No. 585,580 include separator disks between the rollers as an element of the bearing. Separator disks are not employed in plaintiff's bearing. Five of the claims of Kempster patent No. 747,324 include such separator disks, but claim 6

vantages of the central guide rib. Nor do they indicate that it is of any consequence whether the central guide rib is on the stationary or the rotating race when the bearing is in operation.

Plaintiff claims that he achieved invention in being the first to perceive the advantage of the central guide rib as a means of correcting skewing and to specify that the rib must be placed on the stationary race if this advantage is to be realized.⁴ However, in specifying the placement of the central guide rib on the stationary race, plaintiff does not call for any different combination of elements

does not, and the specification states that the separators may be entirely dispensed with, if so desired. It is apparent from a consideration of both Kempster patents that the separators would also not be necessary to the operation of the bearing described in Kempster patent No. 585,580.

⁴ Actually plaintiff's patent does not make it clear that the skewing correcting function of the central guide rib depends upon its placement on the race which will be stationary when the bearing is in operation. Eight of the patent's nine claims specify the placement of the central guide rib on the stationary race. Claim 9, one of the four claims in suits, does not. The specification of the patent does not indicate that the claims which specify the placement of the central guide rib on the stationary race, do so because such arrangement is necessary if the rib is to function to correct skewing. The specification merely states, without explaining why, that it is preferable that the central guide rib be placed on the race which will be stationary in operation. Consequently, defendant contends that plaintiff's patent is invalid for failure to adequately describe his invention as required by statute. 35 USC §33. As well, defendant contends that, since the provision that the central guide rib be placed on the stationary race was added to claims one

in the bearing structure itself than is revealed in the prior art. Which of the two races of a roller bearing will be stationary when the bearing is in operation depends upon the use to which the bearing is put. In some applications the outer race of the bearing will be stationary and the inner race will rotate; in other applications the inner race will be stationary and the outer race will rotate. Both applications requiring inner-race rotation and those requiring outer-race rotation are old and common. In order to produce bearings which would conform to plaintiff's description one would simply have to make two types of bearings—one type with the central guide rib on the inner race and the other type with the rib on the outer race. The bearing with the rib on the inner race could then be supplied for applications requiring outer race rotation, and the bearing with the rib on the outer race could be supplied for applications requiring inner race rotation.

But, as has been noted, the prior art reveals both a bearing with the central guide rib on the outer race and a bearing with the guide rib on the inner race. Either type of these bearings could be appropriately employed in applications in which the race having the guide rib would be stationary.⁵

through eight by way of amendment, such claims are void as claims for new matter unsupported by a supplemental oath.

Although there is merit to both of these contentions, we do not reach them in view of the conclusion that plaintiff's patent is invalid for lack of invention.

⁵ The Heim patent and the Kempster patent, No. 585,580 for a bearing with the central guide rib on

It is apparent that the extent of plaintiff's contribution to the art was to point out that old devices had a theretofore unperceived advantage which would be realized in some old and common applications, but not in others. In the words of the Supreme Court in *General Electric Co. vs. Jewel Incandescent Lamp Co.*, 326 U.S. 242, 249 (1945), "that did not advance the frontiers of science in this narrow field so as to satisfy the exacting standards of our patent system. Where there has been use of an article or where the method of its manufacture is known, more than a new advantage of the product must be discovered in order to claim invention." This is so even though the recognition of the new advantage may benefit industry and bring new commercial success to the product.

Thus, solely from the comparison of the prior art with the teaching of plaintiff's patent, without weighing the testimony of any witnesses, expert or otherwise, the only reasonable conclusion that can

the outer race both illustrate the bearing as it might be employed in the hub of a wheel. If the bearing were so employed, the outer race having the central guide rib would be the rotating race. But, there is nothing in the specification of either patent to suggest the bearing could not be employed as well in applications wherein the outer race would be stationary.

The Kempster patent, No. 747,324, which depicts in figures 4 and 5 a bearing with the central guide rib on the inner race, does not illustrate any application of the bearing. But, the specification states that the bearing design is especially appropriate for sheaves of pulley-blocks and wheel-hubs. In these applications, the inner race with the central guide rib would be stationary.

be drawn is that the patent is invalid. The verdict of the jury must therefore be set aside and judgment entered in favor of defendant. Cutter Laboratories, Inc., vs. Lyophile-Cryochem Corp., 179 F.2d 80, 84 (9 Cir. 1949).

Present judgment accordingly.

Dated: July 31, 1956.

[Endorsed]: Filed August 1, 1956.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 33,567

RALPH F. STALLMAN, Plaintiff,

vs.

CASEY BEARING COMPANY, INC.,
Defendant.

JUDGMENT

Defendant's Motion For Judgment Notwithstanding the Verdict having come on regularly for hearing, upon the record herein, and the matter having been fully briefed and argued, the Court having rendered a written opinion on July 31st, 1956 directing that the verdict of the jury be set aside and that judgment be entered in favor of defendant herein, it is hereby

Ordered, Adjudged and Decreed that:

1. Stallman patent No. 2,334,227 is invalid.
2. The verdict of the jury recorded herein on April 23rd, 1956, finding claims 3, 4, 5 and 9 of

Stallman patent No. 2,334,227 valid and infringed by the defendant, and awarding damages in the sum of \$3,683.51, and the judgment based thereon entered on April 25, 1956, are hereby set aside.

3. Judgment is hereby entered for the defendant dismissing the action, with costs to the defendant in the amount of \$., as taxed by the Clerk of the Court.

Dated: August 8, 1956.

/s/ LOUIS GOODMAN,

United States District Judge

Approved as to Form:

ALBERT D. ELLEDGE,

GEORGE B. WHITE,

/s/ By GEORGE B. WHITE,

Attorneys for Plaintiff

[Endorsed]: Filed August 8, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ralph F. Stallman, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment notwithstanding the verdict entered in this action on August 8, 1956.

Dated: September 7, 1956.

GEORGE B. WHITE,

ALBERT D. ELLEDGE,

/s/ By GEORGE B. WHITE,

Attorneys for Plaintiff

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF SURETY FOR
COST BOND ON APPEAL

To the Clerk of the United States District Court,
Northern District of California, Southern
Division:

Whereas, on August 8, 1956, judgment against the plaintiff Ralph F. Stallman was entered in the above entitled case and said plaintiff has filed a notice of appeal from said judgment,

Now, Therefore, said plaintiff deposits with you herewith the sum of Two Hundred and Fifty (\$250.00) Dollars cash, of which said plaintiff Ralph F. Stallman is the owner, said money to be held and disbursed by you as security for costs on appeal as follows, to wit:

The condition upon which said deposit is made is that if the said Ralph F. Stallman shall prosecute his appeal with effect, and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then said deposit shall be returned to said plaintiff, otherwise to be applied by you to pay such costs, and the balance, if any, returned to said plaintiff.

Said plaintiff agrees by and through its undersigned attorney that in case of default or contumacy on plaintiff's part, the court may upon notice to him of not less than ten (10) days proceed summarily and render judgment against said

plaintiff in accordance with his obligation above recited and award execution thereon.

/s/ RALPH F. STALLMAN,

/s/ By GEORGE B. WHITE,

Attorney in fact for Appellant

Ralph F. Stallman

Duly Verified.

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Notice of Hearing and Motion of Defendant, McGill Mfg. Co. to Quash, etc.

Memo. in Support of Motion to Quash.

Affidavit of Robert D. Anderson in Support of Motion to Quash.

Affidavit of Thomas W. Crosby in Support of Motion to Quash.

Order Extending Time for Casey Bearing Co. and T. W. Crosby to Plead.

Affidavit of Charles S. McGill in Support of McGill to Quash.

Interrogatories by Plaintiff to Defendants.

Answer of McGill to certain of Plaintiff's Interrogatories.

Answer of Casey Bearing Co. to certain of Plaintiff's Interrogatories.

Order Quashing Service of Summons.

Interrogatories by Defendant to Plaintiff.

Answer of Casey Bearing Co. and T. W. Crosby to Complaint.

Answer of Plaintiff to Interrogatories by Defendant.

Interrogatories by Plaintiff to Casey Bearing Co. and T. W. Crosby.

Answer of T. W. Crosby for himself and as President of Casey Bearing Company to interros. by Plaintiff.

Notice by Defendants of Hearing and Objections to Interrogatories.

Reply of Plaintiff to Objections of Defendants to interros. 25, 26 and 29.

Clarification by Plaintiff re Objections to Interrogatories.

Order Removing Objections to Interrogatories from Calendar.

Notice by Defendant of Additional Prior Art to be Relied Upon at Trial.

Stipulation re Subpoena to Defendant Thomas W. Crosby.

Verdict.

Judgment on Verdict.

Motion of Defendant for Judgment Notwithstanding Verdict and Motion for New Trial.

Affidavit of Foorman L. Mueller in Support of Motion.

Memorandum of Costs by Plaintiff.

Amended Memorandum of Costs by Plaintiff.

Opinion of Court on Motion for Judgment Notwithstanding Verdict.

Judgment.

Memorandum of Costs by Defendant.

Notice by Plaintiff of Motion to review taxation of Costs.

Notice of Appeal.

Appeal Bond.

Designation of Record on Appeal.

Order Relative to Costs.

Deposition of Ralph F. Stallman and Deposition of Thomas W. Crosby.

Reporter's Transcript of Proceedings, August 9, 1954.

Reporter's Transcript of Proceedings, April 18, 19, 20, and 23, 1956.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 5-a, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17.

Defendants' Exhibits: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, S-1, S-2, S-3, T, T-1, T-2, T-3, U, V, W, X, X-1, and Y.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of October, 1956.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By MARGARET P. BLAIR,

Deputy Clerk

In the United States District Court, Northern District of California, Southern Division

No. 33567

RALPH F. STALLMAN, Plaintiff,

vs.

CASEY BEARING COMPANY, INC, a corporation; and T. W. CROSBY,
Defendants.

REPORTER'S TRANSCRIPT

Wednesday, April 18, 1956

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: George B. White, Esq., Albert D. Elledge, Esq. For the Defendant: James M. Naylor, Esq., Foorman L. Mueller, Esq.

(A jury was duly impanelled and sworn to try the cause, after which statements were made by respective counsel as follows:) [1*]

* * * * *

RALPH F. STALLMAN

the plaintiff herein, called as a witness in his own behalf; sworn.

Q. (By the Clerk): Will you state your name to the Court and jury?

A. Ralph Frederick Stallman.

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

(Testimony of Ralph F. Stallman.)

Direct Examination

Q. (By Mr. White): What is your address, Mr. Stallman? A. 4800 Reinhardt Drive, Oakland.

Q. What is your occupation?

A. I am a sales engineer.

Q. I will show you patent No. — [14]

* * * * *

Mr. White: If Your Honor please, I offer the United States Patent No. 2,334,227 in evidence as Plaintiff's Exhibit 1.

(Whereupon the patent in suit, No. 2,334,227 was received in evidence and marked Plaintiff's Exhibit No. 1.)

[See Book of Exhibits.]

Q. (By Mr. White): Mr. Stallman, I hand you a copy of the patent. Will you explain to the jury in general what your patent pertains to, Plaintiff's Exhibit 1?

A. The patent is on the method of cancelling skewing when it occurs in a bearing.

Q. Will you explain what skewing is?

A. Skewing is the action that a roller in a bearing has under load to go askew or cock itself on a race, which causes terrific friction.

* * * * *

Q. (By Mr. White): Will you demonstrate skewing on this Plaintiff's Exhibit 2 for identification? [15]

A. Skewing is when a roller goes off access, which would cause drag on the bearing, terrific friction, and cause the shaft in the bearing to act er-

(Testimony of Ralph F. Stallman.)

ratio. In this roller skewing is cancelled, as you can see. We will start off as skewing out. When we get to the bottom of that track, the roller is perfectly straight. Either way I can do that, and by the time we get to the bottom of that track the roller is straight. It is self-correcting in action. That is the first time this has ever been done.

Q. In your patent all the rollers are running on a track or guide rail like the one you are demonstrating?

A. Yes, this should be considered in the form of a circular ring, such as you see in that bearing that Mr. White showed. We show it in a plane so we can demonstrate it, but this would really be a large circular ring in which a full number of rollers are revolving. The action is the same.

* * * * *

Q. (By Mr. White): I hand you at this time Plaintiff's Exhibit 3 for identification and I ask you to describe what that is.

A. This is the outer race and the rollers of [16] a roller bearing in which the rollers have a centrally reduced portion, such as this roller; that portion is engageable with a race, a ring on this outer race, similar to this ring which we have shown here. The rollers race around here and they are guided in their travel on this central rail, which keeps them straight and keeps the roller running on its proper axis and keeps friction out of the bearing.

Q. When you were referring to "this here," you

(Testimony of Ralph F. Stallman.)

were referring to the bearing, Plaintiff's Exhibit 3 for identification, is that right? A. Yes.

* * * * *

Q. (By Mr. White): Mr. Stallman, will you look at Plaintiff's Exhibit 4 for identification and explain what it is?

A. In all of these figures?

Q. Not the figure first. What is that?

A. That is a copy of the drawing in my patent.

Q. It is an enlarged photostatic copy of the drawing in your patent, is that right? [17]

A. Yes.

Q. I would like you to point out, referring to the colors that they are colored, these various parts.

A. The colors in this case show pink as the outer race in all of these, under here as well; yellow as the rollers in between these races, this one in here (indicating); blue as the inner race which is mounted on the shaft, or blue as the race that does not carry the guide rail. You will notice this race does not have a guide rail. It is shown here, it is shown here, it is shown here (indicating). The pink stationary race in all cases carries the guide rail. Here is the guide rail shown in red. Here it is again in circular form. Here is the guide rail shown in the form such as we just talked about here.

Q. When you say "here" you refer to the exhibit—— A. The exhibit is this Exhibit 1.

Q. I believe that is Exhibit 2. Point out if you can the skewing action of the rollers as it may be

(Testimony of Ralph F. Stallman.)

demonstrated on that large photocopy of the patent drawings, Plaintiff's Exhibit 4 for identification.

A. This shows in my invention a roller skew in which case this is contacting the rail exactly as it did here.

Q. When you refer to "this" will you refer to the figure number on which that is shown, for the record?

A. In Figure 7 we have the roller which is [18] contacting the rail as shown and is contacting at this Figure A, and as that contacts Figure A that brings about the correction of the roll the same as the contact brought about the correction of the roll on this board. We are comparing this with the older style bearings which this bearing has replaced. In the old style bearing the roller contacted this side, and as it contacted the side it would just bind here and tip. This other bearing, as it contacted the rail, is contacting it off center and it would straighten. This is heavy at one end. I can't describe that.

Q. (By the Court): Mr. Stallman, look at that Exhibit 2. What is it that you said corrects the skewing? The rail with the slat running along it?

A. The raised rail with this roller shoulder contacting the rail on one side, and you will notice that roll has a longer end beyond that shoulder than it has at the leading end. Our purpose is to cause this trailing end in the roller to catch up with the leading end, and we do that by contacting it off balance, you may say, and bringing it back on balance.

(Testimony of Ralph F. Stallman.)

Q. If each side of the roller were of equal length, you would still have skewing?

A. Each side of the roller is of equal length.

Q. You said this side was longer than the other.

A. We contacted it at but one side under here with this rail. We contacted off balance to bring it into balance, [19] but the roller is otherwise symmetrical.

* * * * *

Q. (By Mr. White): Mr. Stallman, I would like you to explain what Plaintiff's Exhibit 5 for identification is.

A. This is a machine that was made to show bearings.

Q. Who made it? A. I made that.

Q. All right.

A. That is made to show bearings in their actual in a representative machine, and we have here the outer race of the bearing, which is stationary in these end blocks; we have the inner race of the bearing which is pressed to the shaft so that it becomes a part of the shaft and is a revolving part. We have the rollers in between. Now, this exhibit shows that the shaft runs very free.

Q. Will you place a load upon the shaft and explain how you put the load on there?

A. In placing a load upon the shaft, we are doing just what happens in every loaded machine. We have to pull this down to represent a load. We pull it down as tight as we can until this bottoms on the plate. Our bearing still revolves, [20] a little

(Testimony of Ralph F. Stallman.)

more sluggish because we are building up friction due to load, which happens in any bearing, but the rollers in that bearing are running perfectly and there is no drag on that. That is under quite a severe load.

Q. Will you point out the condition of the base plate when you pull that load off?

A. To show the load that that bearing is on, that base plate is actually bowed. The shaft is likewise bowed. We have put a terrific load on those screws in the center member.

Q. How would that action you have demonstrated compare with a regular roller bearing?

A. That is what is happening in any of them.

Q. How could you demonstrate that, if you can?

A. We are demonstrating shaft action in a bearing which is happening in every machine, large or small, to some degree.

Q. You are demonstrating now with a roller made in accordance with your patent?

A. Yes.

Q. Could you demonstrate also with a regular roller bearing?

A. Yes, there is a block of wood that I would like to have. Could I show the jury the way that shaft is turning?

The Court: I do not know what your attorney wants you to do.

Mr. White: May it be permitted for some of [21] the jurors to see how it rotates in comparison with the next test?

(Testimony of Ralph F. Stallman.)

The Court: I think the witness can demonstrate that.

Q. (By Mr. White): Substitute now, if you will, bearings made in accordance with the patents, the regular roller bearing. When you do that you might describe what we call here a regular roller bearing.

A. A regular roller bearing is the bearing that was used everywhere in industry for, oh, at least 20 years, perhaps 25 years, and it is shown in this sketch.

Q. To what figure are you pointing?

A. This is Figure 6. That is the type of bearing that we started out to correct. [22]

* * * * *

Q. (By Mr. White): Mr. Stallman, during the recess you did something to that machine model, Plaintiff's Exhibit 5 for identification. Will you explain what you did?

A. Yes. I substituted for these two bearings which are manufactured under my patent for two of the old style. The one under my patent is in Figure 7, center guide, or two of the old style in Figure 6.

Q. Mr. Stallman, would you step back so that His Honor will be able to follow your pointer?

A. Yes. The bearings that were removed from that machine are these shown in Figure 7. The substituted bearings are in Figure 6.

The load was applied in the same fashion in all of the bearings, and to demonstrate the friction in

(Testimony of Ralph F. Stallman.)

this bearing, it is very easy to see, when you reverse that thing it practically locks up. And that is the condition that applied to all of these bearings in a greater or lesser degree wherever I have seen them applied, and that goes on for quite a long time.

Q. About how long were you connected with the bearing business?

A. I have been on this particular bearing for over 20 years.

Q. What do you mean, this particular bearing?

A. This needle bearing. I have been on the needle bearing in both Figure 6 and Figure 7—or Figure 6, rather, [23] for 20 years. I have been in the bearing business for longer than that.

Q. Just in general, what causes the locking that you demonstrated there of the plain rollers of the type shown in Figure 6 of the patent?

A. Of all the bearings out in service in Figure 6, we know that the load applied on one end of the roller when greater than the other end, will cause those rollers to skew as you see. The moment they skew they bear at one end of the roller and set up a friction which causes the roller to skew to a greater degree, and that goes on until the bearing practically locks up.

Q. And wherein is the difference between that and the bearing of your invention as shown in Figure 7 of the patent?

A. In Figure 7 we have a roller with a central groove that contacts a central rail, and as this roller rolls against that rail in a skewed position, it con-

(Testimony of Ralph F. Stallman.)

tacts at this point and not the end. Now, in contacting at this point it is setting up an unbalance or leverage in that roll that causes the retarded end to overtake the leading end, bringing it back in alignment. Now, once in alignment, it is very likely called upon to ever perform that function again; it is more or less in balance. Therefore the friction is very low.

Q. (By the Court): What specifically brings about or causes it to come back into line again? [24]

A. This inner race which we show—or this other race which we show without a guide rail propelled this roller equally across its surface.

Q. That is not clear to me, that the outer race does that. Take that No. 3. Where is there? There it is right there. What is it specifically in the physical make-up that causes this skewing as you say to be corrected?

A. As this roller skews, it rolls against this rail at this point. Now, that point is on the leading edge of the roll and it is of a lesser distance than the distance from this shoulder to the other end of the roll, so the greater distance overcomes the lesser distance unless the roll rolls freely.

Q. So, then, what I asked you before is correct: It is a matter of the distance involved on the one side of the bearing that you say causes the balance, the balancing.

A. Yes.

Q. It is a matter of the distance involved?

A. Yes.

Q. (By Mr. White): The distance from where,

(Testimony of Ralph F. Stallman.)

Mr. Stallman? Will you point out and explain it? Is it the distance from the point of contact?

A. The distance from the point of contact to the trailing edge.

Q. The point of contact between what? [25]

A. The point of contact between the rail and the shoulder of the roller to the trailing edge of the bearing is greater than the leading edge, so it will naturally throw that roll over into balance.

Q. What kind of force would you call it that works at the point of contact between the shoulder and the rail of the bearing? What would be the description of the force?

A. That is a frictional force.

Q. (By the Court): That is the essential element in the method of preventing skewing, as you claim it?

A. Yes, the way we apply the friction to bring about the correction.

Q. The slot itself and the track do not bring that about except for that arrangement by which the distances are made different, is that right?

A. Yes, the distances, the clearances.

The Court: I am only asking these questions to try to get it clear to the jury, that is all, because if it is clear to me, I think it will be clear to the jury.

Q. (By Mr. White): Well, let's explain, to clarify this further, Mr. Stallman. Is one side of the roller the same as the other as it is made?

A. Yes, the roller is symmetrical.

Q. Does symmetrical mean that the reduced por-

(Testimony of Ralph F. Stallman.)

tion or groove on the roller is in the middle? [26]

A. Yes.

Q. Now, when you are talking about the distances, what are you talking about? What do you refer to—these uneven distances?

A. The uneven distances are brought about by the method of applying the friction that we use.

Q. What is that distance?

A. That distance is——

Q. From where?

A. From the shoulder to the end of the roll which is a greater distance than from the shoulder——

Q. From which shoulder? You see, you are pointing, and the record does not show to what you are pointing.

A. The correction comes about by the engagement of the shoulder farthest from the end of the roller. Now, that would be this shoulder farthest from the end of the roller, which is a greater distance than the short end of the roller (indicating).

Q. What causes the skewing?

The skewing is caused by the load applied to the bearings. As the load becomes uneven, it comes on one end of the roll to a greater degree than the other and the free end of the roller runs along freely while the loaded end is retarded.

Q. Which is the loaded end, for instance, when you show it in a skewed position? [27]

A. If this roller was skewed in this direction, the loaded end would have been this direction.

(Testimony of Ralph F. Stallman.)

Q. Which is "this"? Is that the retarded or advanced part? A. That is the retarded.

Q. You mean to say that the retarded part has a bigger load and that is why it is held back; is that right? A. Yes.

The Court: Why has it got a bigger load?

A. Because the shaft deflection would cause a heavy load on one end. You see, the load is applied to this bearing through the pressure of the inner race on the bearing as demonstrated here.

Q. Now, look, Mr. Stallman. The distance from the outer edge to the inner edge of this roller is the same as the distance from the inner edge to the outer edge of this roller, isn't it? A. Yes.

Q. So therefore these are of equal length, these two rollers on each side of the so-called slot.

A. Yes.

Q. If you call it that. A. Yes.

Q. Of course, naturally, it wouldn't take a Philadelphia lawyer to see that the distance from here to here is greater [28] than the distance from here to here. That isn't the basis of your claim, is it?

A. That is what brings about the correction of this skewing.

Mr. White: Yes, but there are forces which bring about that skewing, aren't there? A. Yes.

The Court: There must be something else besides the distances involved. You haven't made that clear yet.

A. In a roller bearing, an anti-friction bearing, the word "anti-friction" means lack of friction.

(Testimony of Ralph F. Stallman.)

Now, a roller bearing theoretically should have no friction; but in making correction, friction is brought into that roller momentarily to accomplish that correction.

Q. (By the Court): What is the correction that you make?

A. We bring it back onto its axis so it does not have any more force or pressure on that central rail. In normal action that roller should not contact that rail; only when skewing comes about does the roller correct.

Q. (By Mr. White) Mr. Stallman, when a shaft rotates, then it sets up certain uneven forces on the opposite ends or near the opposite ends of the rollers; is that right? A. Yes, sir.

Q. Now, one would be greater than the other, wouldn't it? The force on one end would be greater than the other one? A. Yes. [29]

Q. Now, what happens on the side where the force becomes greater when it is unbalanced?

A. The roller is squeezed and it is retarded.

Q. It is slowed down, then?

A. It is slowed down, yes.

Q. All right. And what happens to the other side of the roller?

A. It is not squeezed; it is lightly loaded and it advances ahead of the other end—of the loaded end.

Q. So one side slows down and the other speeds up in rolling and it is not straight any more; is that right? A. That's right.

(Testimony of Ralph F. Stallman.)

Q. When the shoulder on that side contacts the rail, what happens there?

A. We are setting up a frictional force.

Q. And that frictional force is what? What does the frictional force do?

A. It retards the advanced end of the roller and brings it back in alignment with the retarded end of the roller.

Q. Slows down that roller, is that what you mean? A. Yes.

Q. It slows down the side of the roller which was ahead? A. That's right.

Q. By the frictional force, and when it slows down then the other side speeds up? [30]

A. Yes.

Q. Is that correct? A. Yes.

The Court: There were bearings before that were constructed as this one was, going on a slot?

A. This one? These that we are talking about? Never. The appearance of this bearing is the first in the history of the industry.

The Court: You better develop it yourself, Mr. White. It isn't clear to me yet. Maybe you can develop it.

The Witness: Now, there has been nobody, as far as I can find out—

The Court: Well, the attorney will argue it. I am trying to get the fact. You go ahead, Mr. White, and develop it your own way.

Q. (By Mr. White): I would like you to take in hand one of these roller bearings from the model

(Testimony of Ralph F. Stallman.)

machine, Plaintiff's Exhibit 5, which you first demonstrated.

A. This—These are the two bearings that were removed.

Q. To your knowledge, that is a bearing which is sold by the defendant Casey Bearing Company in this case? A. Yes.

Q. And will you point out on that an inner race?

A. The inner race is this part on the shaft that is pressed to the shaft and becomes a part of it. [31]

Q. Did that come with the bearing?

A. Yes.

Q. And you pressed it in the shaft?

A. Yes.

Q. Is that inner race rotatable? A. Yes.

Q. And point out the outer race on that bearing.

A. The outer race is the one I have.

Q. And this application, is that relatively stationary? A. Yes.

Q. What does relatively stationary mean, anyway? A. It is not revolving.

Q. Point out the rollers, if you can, between the inner and the outer races on that bearing.

A. The rollers are these rollers between the inner and the outer race.

Q. And have those rollers in that bearing aligned reduced portions? A. Yes.

Q. Can you point it out in the bearing?

A. I can by taking this bearing apart, but I can point it out in Figure 1. [32]

(Testimony of Ralph F. Stallman.)

Q. (By Mr. White): It has in it exactly the same kind of a reduced portion as shown in your patent? A. Yes.

Q. It has in it a ring which is carried by the outer race? A. Yes.

Q. Does that project into the reduced portions of the rollers? A. Yes.

Q. Does it prevent the longitudinal movement of the rollers? A. Yes.

Q. It has in it a second ring? A. Yes.

Q. For the purpose of holding them in place?

A. Yes.

Q. Now, in this case is there any projection or ring on the rotatable race or on the inner race?

A. No.

Q. Is the inner race moved? A. Yes. [33]

Q. There is nothing on it? A. No.

Q. Now, then, if you would repeat again with reference to this misalignment, first, if you would explain it better. Apparently His Honor didn't clearly understand it and therefore we can assume that the jury might need further explanation as to what are the forces which are acting which cause the misalignment of roller bearings and this so-called skewing and which are the forces that are set up in the bearing of your patent which act to keep them straight and to correct the misalignment. And talk in terms of the forces as they are exerted, instead of just shoulders and bumps and distances.

A. The forces come about this way: this inner race in Figure 1 is mounted on a shaft which is

(Testimony of Ralph F. Stallman.)

subject to all the movements of the machine—deflection, vibration, shock, oscillation. All of the forces that come into a machine in action are exerted on the shaft into this race, which in turn exerts those forces through these rollers into the outer stationary race. Now, in exerting the forces when this shaft bends—and it surely bends as demonstrated here—when it bends——

Q. When you said “here,” you were referring to—— A. Demonstrated on the model. [34]

Q. On the machine, Plaintiff’s Exhibit 5.

A. Now, as that shaft deflects, a higher pressure is created at one end of this sleeve or in a race than it is at the other. Now, when this higher pressure is exerted on the sleeve, it tends to crush or flatten the rollers under that load. The flattening of the rollers decreases their diameter so that the unloaded or the lightly loaded portion of those rolls being normal will advance in their usual path, but this heavily loaded end will be retarded. Now,——

Q. What would happen if there was nothing there to correct that skewing or misalignment?

A. The roller would just run completely out of the bearing and it would destroy itself.

Q. If it couldn’t run out of the bearing because it was held by the ends, then what would happen?

A. If it is held by the ends as in Figure 6, it sets up a terrific pressure, pressure which actually excites it to skew to a greater degree, and the condition is aggravated until the friction is so great

(Testimony of Ralph F. Stallman.)

that the bearing would either lock the shaft or destroy itself, or at least would set up so much friction it wouldn't be exactly practical.

Q. All right. Now you can tell us what forces you set up in terms of forces to correct that—what forces your invention sets up.

A. In Figure 7 all of the forces in this bearing in rotating [35] would be normal bearing forces. The particular forces that are set up in this style bearing are heavily loaded conditions on one end of the shaft, which would be the retarded end, because these rollers are run in this direction——

Q. When you say “in this direction,” that is downwardly on that bearing?

A. The arrow points in the downward direction. Now, these rollers would become locked up if they did not have this center guide. They would start to lock up here and it would advance——

Q. When you were referring to “here,” you were referring to the retarded end?

A. The retarded end. They would start to lock up the retarded end. The free end would advance until it took all of the rollers and put them in the same position. Now, in this style bearing in Figure 7 before any great amount of skewing is created, the roll contacts the rail at that point. Now, we introduce a friction—far less friction at this point than you have at that, it is true, but we exert sufficient friction to bring about the correction of that roll, because we actually put the brake on that

(Testimony of Ralph F. Stallman.)

point, to permit this retarded end to come up even with the advanced end.

Q. When you say at that point, you mean you put the brake on on the advanced half of the roller?

A. We put the brake on the advanced half of the roller. [36]

The Court: How do you do that?

A. By its contact with this rail and this shoulder as demonstrated here. Now, if we put the brake on at the advanced end of the roller, the retarded end has to catch up to it and put it straight ahead.

The Court: How do you get that brake on? I am asking these questions to help the jury.

A. That brake is effected by contacting this shoulder of the bearing with the stationary guide rail.

Q. How do you do that? How is that brought about?

A. By rolling into it, the same as an automobile wheel would roll into a curb. The minute you hit a curb with an automobile wheel, there is a terrific friction created and that is what is happening here.

Q. Well, if it takes a force to bring an automobile wheel into contact with a curb, turning it into a curb, how do you do that with this?

A. This force has already been introduced into the bearing through the misalignment of the shaft such as we showed in this model.

Q. (By Mr. White): In other words, it is self-aligning, the force which caused the misalignment

(Testimony of Ralph F. Stallman.)

will exert the force of friction between the shoulder of the advanced portion of the roller and the guide rail? A. Yes. [37]

Q. To slow down the advanced portion, is that right?

A. Yes. In normal bearing use, we have these forces. My device corrects those forces. Now, the forces are brought about by the normal running of this type of bearing. The guiding force as we introduced it puts the brake on in the portion of the roll that is leading and retards that portion until the retarded portion of the roll catches up; then the roll runs practically free in its forward half.

The Court: Has that got anything to do with the weight of one side or the other of the bearing?

A. None whatever.

Q. (By Mr. White): Mr. Stallman, do you know Mr. Crosby, the defendant in this case? A. Yes.

Q. How have you known him?

A. I have known Mr. Crosby through the bearing business.

Q. Did you have any occasion to discuss your patent with him, the patent involved in this suit?

A. Yes.

Q. About when was that?

A. Oh, to the best of my recollection, that would be about 1947 or '48.

Q. Where did you talk to him about your patent at the time?

A. Right in front of his store on Golden Gate Avenue.

(Testimony of Ralph F. Stallman.)

Q. Was there anybody else present? [38]

A. No, just Crosby and myself.

Q. And so far as you remember, what was the substance of that conversation?

A. Well, I talked——

The Court: Why don't you sit down?

The Witness: Thank you.

I talked to Mr. Crosby and in my enthusiasm I showed him a fine new bearing, and he suggested that I take that bearing and show it to Mr. McGill.

Q. What was his connection with Mr. McGill, to your knowledge?

A. Well, I believe Mr. McGill, Mr. Crosby is related to Mr. McGill through marriage, I believe.

Q. And as I understand, Mr. Crosby suggested that you see Mr. McGill. A. Yes.

Q. Who is Mr. McGill?

A. Mr. Charles McGill is president of McGill Manufacturing Company who manufacture this bearing.

Q. And after that suggestion, did you see Mr. McGill? A. Yes.

Q. Where?

A. Back at the factory in Valparaiso, Indiana.

Q. About when?

A. I would say that was in 1948. [39]

Q. And did you reach any sort of arrangement with the McGill Manufacturing Company?

A. Yes, our meetings terminated in a contract.

* * * * *

Q. (By Mr. White): Mr. Stallman, when you

(Testimony of Ralph F. Stallman.)

referred to a contract previously, did you refer to this letter of June 23, 1948? A. Yes.

Q. In general, was there anything done in pursuance to that letter of June 23, 1948?

A. Oh, yes, they manufactured my bearing, they paid me royalties on it; I gave them a great deal of help and it was a very nice arrangement. [41]

* * * * *

Q. (By Mr. White): I will show you here a catalogue entitled "Guiderol McGill Precision Bearings," and I ask you whether you can identify that as to what it is.

A. Yes, that is the first catalogue that ever came to my notice. It is a complete catalogue on my bearing; it has the patent number right on it, and it describes my bearing very much——

The Court: Well, that is the catalogue that the McGill Manufacturing Company got out, is that right? A. Yes.

Q. And distributed? A. Yes.

Q. (By Mr. White): And that was subsequent and in accordance with that letter of June 23, 1948; is that right? A. Yes.

Q. And that is the catalogue that to your knowledge was used in connection with the sale of these Guiderol bearings? A. Yes.

Q. And those Guiderol bearings were the same as you demonstrated here as Plaintiff's Exhibit 5-A for identification? A. Yes. [46]

* * * * *

Q. (By Mr. White): About how soon after the

(Testimony of Ralph F. Stallman.)

letter of 1948 were those catalogues, so far as you know, sent out?

A. From my memory, it would be from a year to a year and a half later.

Q. And were they prior to the commencement of this suit? A. Oh, yes.

Q. Long prior? A. Yes.

Q. And were they also mailed to you?

A. Yes, they came into my possession either at the local plant or through the mail. I can't recall that far back, but I think they were mailed.

Q. To your knowledge is that the same catalogue which was used prior to the filing of this suit by the defendant Casey Bearing Company in the sale of this Guiderol bearing? A. Yes. [47]

* * * * *

Q. (By Mr. White): How long did that relation under the letter of June 23rd, 1948 continue with McGill Manufacturing Company for the manufacture and sale of Guiderol bearings?

A. What is that question again? When did it——

The Court: How long did it continue?

A. Three and a half or four years.

Q. (By Mr. White): I show you a photostatic copy of a letter of December 6, 1950, which might refresh your memory as to the length of time that your relation continued with McGill.

A. Yes, this is the notification of the termination.

Q. What was the date of that?

(Testimony of Ralph F. Stallman.)

A. December 6, 1950.

Q. And was that catalogue that we referred to previously which is now marked as Plaintiff's Exhibit 7 for identification used all throughout that period? A. Yes.

The Court: That is from 1948 to 1950?

Q. (By Mr. White): From 1948 to December, 1950? [48]

A. No, I will qualify it; it took some time to prepare that catalogue, probably from 1949 to the——

The Court: To the end of 1950?

A. Yes. [49]

* * * * *

Q. (By Mr. White): Mr. Stallman, I hand you herewith Plaintiff's Exhibit 7, the patent of McGill, and I ask you to examine and ascertain whether or not the patent number which appears on the bearing is the same as your patent 2,334,227.

A. Yes, it is.

* * * * *

Q. Mr. Stallman, I hand you here three blueprints tied together and I ask you whether you can identify what they are.

A. These are prints of the McGill bearing that was made for the Casey Bearing Company.

Q. Is the Casey Bearing Company the same company who is the defendant in this case?

A. Yes.

Q. Were these sent to you by the McGill in the usual course of business? A. Yes.

(Testimony of Ralph F. Stallman.)

Q. What was the purpose of those prints?

A. Those prints were that I might study them, [50] correct them, help them along in the design.

Q. And then they were returned to the McGill Company?

A. No, they were from my personal file.

Q. And were bearings in accordance with those drawings, to your knowledge, ever delivered to Casey Bearing Company, the defendant?

A. Yes.

Q. And were such bearings sold by the Casey Bearing Company, the defendant in this case?

A. Yes.

* * * * *

Q. (By Mr. White): Yes. Will you read the dates from those particular blueprints?

A. April 18, 1950.

Q. Did you receive them about that time or about how long after? About when, do you remember?

A. I would say probably a week or so later.

Q. And they were in your possession since then?

A. Yes.

Q. I will also ask you to read the letter of instructions with respect to patent notice and marking on the particular blueprint, please. [51]

A. It says bearing mark McGill O. R. 22 X-2, patent No. 2334227, made in U. S. A.

Q. And that patent No. 2334227 is your patent number in suit here, is that correct? A. Yes.

(Testimony of Ralph F. Stallman.)

Q. Was that done with your permission and upon your instructions? A. Yes.

Q. That was under this particular agreement to which the letter of June 23rd referred, is that right? A. Yes. [52]

* * * * *

Q. (By Mr. White): Mr. Stallman, just very briefly, I would like you to look at these blueprints, Plaintiff's Exhibit 10, and advise the Court and jury for which companies those bearings were made up and designed by the McGill Company and in each case you state whether, according to your own knowledge, such a bearing was ever made, sold and delivered to those respective parties, if you know.

A. On this bearing No. ST77, those bearings [55] were manufactured and they went to the American Can Company, and they were in use in the American Can Company in San Francisco.

Drawing ST79, these bearings were made and are in use by the American Can Company.

ST121CR, these bearings were manufactured and are in use by the American Can Company.

ST78CR, these bearings were made and are in use by the American Can Company.

ST78CR, that is the working drawing of a part of the bearing mentioned before.

ST78CR is the working drawing of a part.

Roll No. 1193 is the working drawing of a part.

ST78CR is the working drawing of the retaining ring of the same bearings.

ST118 is a working drawing of the same bearings.

(Testimony of Ralph F. Stallman.)

ST118 is a grinding drawing of the same bearings.

Roll No. 1199 is a roller used in these same bearings.

Retaining ring No. ST118 is a ring used in these bearings.

CR12N is an outer race for one of the McGill catalogue bearings which is in use.

Q. For which company was that made? For any particular company?

A. The GR12 is a bearing that was sold by the Casey Company. I did not sell that bearing. GR12 is a working drawing. ST137 is a working drawing. [56] ST137 is a drawing of a bearing used by the Simplex Engineering Company in Zanesville, Ohio. That is in use. I saw that operate.

Q. Did you, Mr. Stallman, during that period between June 23rd, 1948 and the termination in December 1950, did you yourself do any selling of this Guiderol bearing for McGill Manufacturing Company?

A. Yes, I traveled around the East with McGill's sales manager and called on their trade wherever taken, and did what I could to promote the sale of this new bearing.

Q. Were there any sales through you under any trade name? Did you operate under any trade name as a company?

A. No, I was working with McGill under the McGill name.

Q. What is that Truerol Bearing Company?

(Testimony of Ralph F. Stallman.)

A. The Truerol Bearing Company is a company that I operated here for the purpose of making experimental bearings, carrying on experimentations.

Q. Did you under that name buy any bearings from the McGill Manufacturing Company?

A. Yes.

Q. For what purpose.

A. Some of the customers I had in San Francisco, the business that I turned over to the McGill Company.

Q. I will show you here purported commission statement from the McGill Manufacturing Company and ask you to identify that as well as the papers attached to it. [57]

A. This is a royalty statement that was sent out to me by the McGill Company listing all of the companies to which my bearing was sold and paying a commission on the bearing, a royalty on the bearing.

Q. What is the total volume of that?

A. The total volume of this statement is \$12,645.

Q. What is the approximate date or period for which the statement was made?

A. That is November 30th, 1950.

Q. And that was sent to you by McGill Manufacturing Company in the usual course of business?

A. Yes.

Q. And it was in your possession since you received it all the time? It is in the same condition now as when you received it?

A. Yes.

(Testimony of Ralph F. Stallman.)

Q. Those pencil notations are your notations?

A. Yes, I have some notations on here for my own use. The notation here says 86 per cent of these bearings are sold for stationary outer race application.

Q. But those notations were not on at the time you received them, is that right?

A. No, this is my handwriting.

Q. So except for your handwriting and the long-hand notations of the same, that statement is in the [58] same condition as you received it?

A. Yes.

Q. I will show you another commission statement, alleged, from McGill Manufacturing Company to Stallman, and I ask you to identify that.

A. This is another statement, February, 1950. This is \$14,453.92. There is also a notation on this. It says 90 per cent of these bearings were used in stationary application.

Q. That notation was not on when you received that statement, was it?

A. No, that is my handwriting.

Q. Excepting for your handwriting, the rest of the matter is in the same condition as when you received it from the McGill Manufacturing Company, is that right?

A. Yes.

Q. The papers attached there are what?

A. They are copies of sales records, copies of invoices.

Q. And that applies also to the attachments to the first group that I showed you?

(Testimony of Ralph F. Stallman.)

A. Yes. [59]

Q. There are several names there outside of Truerol Bearing Company. Would you identify what those names are and what they have to do with the transaction involved there?

A. These are substantially accounts that I turned over to the McGill Company when they started to make my bearing. They are the Hydraulic Equipment Company in Cleveland, Gallion Iron Works, Gallion, Ohio. There is a duplication through here. I will read them all.

Simplex Engineering Company, Energy Farm Equipment Company, Mealy Printing Press Company, Central Ohio Steel Products, Isaacson Iron Works, Casey Bearing Company—there are probably 30 names here.

The Court: That is sufficient.

Q. (By Mr. White): In each of those cases the names that appear there, Mr. Stallman, were the bearings actually delivered? A. Yes.

Q. And they paid for those bearings?

A. I presume they paid for them.

Q. To your knowledge were they used or were they returned for lack of utility?

A. No, they were all used so far as I know. [60]

* * * * *

Q. (By Mr. White): There is one more question I forgot to ask you with respect to Plaintiff's Exhibit 10. Please look at the drawings and state whether or not those drawings contain any instructions for patent marking.

(Testimony of Ralph F. Stallman.)

A. This one says, "Bearing mark McGill ST77 patent number 2334227." This is the same notation. This has the same notation.

* * * * *

Q. (By Mr. White): To your knowledge the bearings were actually so marked? A. Yes.

Q. After December 1950, when you got that letter of December 1950 which is Plaintiff's Exhibit 8, which is the alleged termination of your agreement as of January 1st, 1951, did you remain in the business of manufacturing and selling Guiderol bearings or some kind of bearings as your patent in suit here? [61] A. Yes.

Q. To what extent?

A. Well, I had one customer left in San Francisco that I continued to furnish bearings to and that is all. All the rest was turned over to the McGill Company.

Q. What is the name of that customer?

A. That is the California Press Manufacturing Company.

Q. What kind of roller bearings do you sell to them?

A. I sell them the center guided bearings under my patent.

Q. Do you mark this with a patent notice in any way? A. Yes.

Q. How do you mark them?

A. We put a slip of paper with the patent number in a package.

(Testimony of Ralph F. Stallman.)

Q. Does the California Press Manufacturing Company resell those bearings to anyone else?

A. No, they use them in machines, which machine they resell.

Q. Those are incorporated as a part of the machine and are they out of sight? A. Yes.

Q. All your other customers that you had at the time, whose names appear on this commission list, to your knowledge, at least those which are in California, do they still buy any bearings, Guiderol bearings? A. Yes, they still buy. [62]

Q. From whom did they buy them?

A. The George C. Casey Company.

Q. And that is the Casey Bearing Company?

A. The Casey Bearing Company.

Q. Is that the defendant in this case?

A. Yes.

Mr. White: That is all the direct examination.

* * * * *

Cross Examination

Q. (By Mr. Mueller): Mr. Stallman, referring to your testimony this morning, it is my understanding that you said the invention of your patent consisted of a method of cancelling skewing in a roller bearing. Is that what you testified, Mr. Stallman? A. Yes.

Q. Then is that what you obtained a patent upon, Mr. Stallman, a method of correcting skewing in a roller bearing? A. Yes. [63]

Q. Is that what your patent 2334227 in suit covers? A. Yes.

* * * * *

(Testimony of Ralph F. Stallman.)

Q. Mr. Stallman, is it a method of cancelling skewing in a roller bearing which you claim as your exclusive rights under your patent 2334227?

A. Yes.

Q. Will you please refer to a copy of your patent 2334227 and point out in your patent where [64] you describe your invention as you have just testified?

A. That is in the second paragraph. It is line 6, I suppose, I first saw, on the right hand side.

Q. On what page, Mr. Stallman, of your patent?

A. The first page.

Q. Will you please read directly from your patent, first identifying the line and the column and page, that which you have testified to as your invention?

A. "A further object of the invention is the provision of a needle type bearing in which the thrust action set up by misalignment of the needle is minimized and is self-correcting through the roll action of the bearing."

Q. Is that your invention, Mr. Stallman, that which you have read from column 2, the second paragraph on page 1 of your patent 2,334,227?

A. Yes, that is part of it.

Q. What other part of your invention—

A. I will have to read this and study it a little bit. From there on it is a description of the parts of the bearing. The last paragraph on the first column states, "It is the object of the present invention to overcome all the above mentioned dis-

(Testimony of Ralph F. Stallman.)

advantages and to provide a needle type bearing in which the needles are retained in place against either the inner or the outer race as may be required by different service, by simple and [65] inexpensive means and by means which will obviate the necessity of difficult grinding operations in the manufacture of the bearing races."

Q. That, Mr. Stallman, is from the paragraph beginning about line 52 or 53 at the bottom of the first column on page 1 and going to the top of paragraph on the second column of page 1, is that correct?

A. Yes, there is further description above that which I could read if you care to hear it.

Q. I am asking you if you would please tell us the invention you made in this patent. That is what we would like to have, if you please.

A. That is primarily the summation of the features.

Q. Do you find in either of those excerpts in your patent which you read the statement that your invention is a method for correcting skewing of a roller in a bearing?

A. The entire description will tell you that.

Q. That is the entire description that you read?

A. The description of the first column tells our reason for doing this, our method of accomplishing it, and what we have accomplished.

Q. Will you please refer to claim 3 of your patent in suit? Does that claim define a method for

(Testimony of Ralph F. Stallman.)

cancelling the skewed roller and roller bearing, cancelling out the skewing of the skewed roller?

A. That mentions in that claim that this [66] prevents endwise movement. If the endwise movement is restricted, the correction comes into place.

Q. Will you please read the language from claim 3 which says what you have just testified to, Mr. Stallman?

A. "A bearing comprising a rotatable inner race and a relatively stationary outer race, rollers interposed between said races and having aligned reduced portions intermediate their ends, a ring carried by the outer race and projecting into the reduced portions of the rollers to prevent their longitudinal movement and a second ring registering with and permanently contained within said reduced portions to hold the rollers in position in the outer race when the inner race is removed."

Q. Mr. Stallman, that claim 3 does not cover method, does it? You do not recite a method in claim 3?

A. Not unless you look over the drawings; it is quite obvious.

Q. Is it your claimed invention, Mr. Stallman, in your patent 2334227 actually the roller bearing with which you hope to prevent skewing? Is that what you are claiming in your patent 2334227?

A. No, our model was made long before we applied for a patent. We did not hope. We knew positively it would prevent skewing. [67]

* * * * *

(Testimony of Ralph F. Stallman.)

Q. (By Mr. Mueller): Mr. Stallman, isn't your claimed invention actually a needle bearing with which you will attempt to prevent skewing? Isn't that the purpose of your invention, to try to prevent skewing in a roller bearing?

A. No, the invention is that we do prevent skewing. [68]

* * * * *

The Court: What did you invent? A method, or did you invent a physical structure? I do not know whether you can answer it or not.

A. I do not know the terms there. I invented a bearing. I made a bearing. After it was made and proven, patent was applied for.

The Court: I think you are going to have to argue that question, counsel. It would not do any good to ask questions of the witness on the matter.

Q. (By Mr. Mueller): Mr. Stallman, can we agree that claims 3, 4, 5 and 9 each define a bearing?

Mr. White: If your Honor please, we stipulate on behalf of the plaintiff that claim 3, 4, 5 and 9 define a bearing structurally.

Mr. Mueller: Thank you. That will take care of it, Mr. White. [69]

* * * * *

Q. Referring to the amendment and page 3 of the amendment of October 30, 1941 under the "Remarks" you state:

"Of the references cited the patent to Heim appears obviously to be the only one which

(Testimony of Ralph F. Stallman.)

deals with a problem similar to that which is corrected by the invention of the present application."

Going further:

"Upon careful analysis of the Heim patent it is found that it does not in fact disclose the most important feature of applicant's invention, and it is believed that the claims now presented in this case clearly distinguish the present invention from the disclosures of Heim."

Do you agree with those statements today, Mr. Stallman? A. Yes.

Q. And going further, on page 3 of the amendment dated October 30, 1941, you state:

"The Heim patent is principally concerned with preventing longitudinal movement of [73] the rolls and is not in any way concerned with preventing misalignment of the rolls relative to their normal longitudinal axis which misalignment is referred to in the arts as skewing."

Do you agree with that today? A. Yes.

* * * * *

Q. Now going on to page 4 of the amendment dated October 30, 1941, you state, and I read:

"In order to prevent skewing the rings would have to be carried by the stationary race of the bearing."

Now, Mr. Stallman, do you mean the guide rail of your bearing to which you testified this morning

(Testimony of Ralph F. Stallman.)

when you talk about the ring would have to be stationary?

A. The guide rail must be stationary for satisfactory performance. The bearing can be misapplied, it can be abused, but it must be stationary for satisfactory performance. We have found that out many places.

Q. Referring to figure 1 of your patent 2334227, would you please point out the guide rail or ring so that there will be no question of that to which you are testifying.

A. This is the guide rail. This is the ring.

Q. Will you give them a number please, so that we know that which you are pointing to?

A. The guide rail carries the number 15; the ring carries the number 10.

Q. And that is the ring and the race that you are referring [75] to as having to be on the stationary or in a stationary position only?

A. That must be on the stationary position for satisfactory performance.

Q. Will a bearing made according to the teaching of Fig. 1 of your patent 2334227 operate if the ring 15 or guide rail on the race ring 10 is mounted in an application so that the race ring 10 and the guide rail 15 rotate?

A. It will operate for a short time but it will be full of friction.

Q. What do you mean by "full of friction," Mr. Stallman?

A. It will run sluggish, it will cause wear in

(Testimony of Ralph F. Stallman.)

the bearing, it will cause heat in operation, it will create many of the undesirable things in the anti-friction bearing field.

Q. In a bearing such as that in Fig. 1 of your patent 2334227 with the race ring 10 and the guide rail 15 on that race ring with them both stationary, is there heat developed in the bearing during operation?

A. Only usual running heat; not heat due to the operation of this particular bearing.

Q. What is the difference in the operation of a bearing, Mr. Stallman, between the usual heat and heat due to the operation of the bearing, if I understood you correctly?

A. In ordinary operation of a bearing, the lubricant itself will create some heat. It is the frictional heat from the [76] rubbing contacts that we must avoid.

Q. Do you avoid all frictional contacts such as I understood you to testify to with a bearing with the outer ring 10 and the guide rail 15 thereon in a stationary position?

A. Substantially all.

Q. And what friction would be developed if that ring 10 and the guide rail 15 were rotating rather than stationary? And we are referring to Fig. 1 of your patent 2334227.

A. These races—this race would tend—

Q. Will you please identify it by number?

A. This race 10 and the ring 15 would wobble engaging the shoulder 14 and 14 on both sides of

(Testimony of Ralph F. Stallman.)

the roller alternately carrying the roller with it, and inducing a skewing which we are trying to prevent.

Q. Now what bearing were you testifying to and what method of operation in this last question? Were you testifying to a ring 10 with a guide rail 15 stationary or rotating, in your last answer?

A. You asked for rotating, I believe.

Q. You were testifying to a condition if the ring 10 and the rail 15 were rotating; is that correct? A. Yes.

Q. Now if the ring 10 and the guide rail 15 on that ring in a bearing installation are both stationary, would you have friction developed in that bearing? [77]

A. Practically nothing; just the friction of the correction of the rolls.

Q. And what would that friction in the correction of the rollers mean relative to the friction that you testified to when that same ring 10 and the guide rail 15 thereon were rotating?

A. Well, if we can judge by the performance we have had of bearings in the field, I would say the friction has proven to date to be in excess of ten times.

Q. Ten times what, Mr. Stallman?

A. Comparing the performance of one of these bearings running in a misapplied form as against the properly applied form.

Q. Have you ever tested, Mr. Stallman, a bearing according to Fig. 1 of your patent 2334227 with

(Testimony of Ralph F. Stallman.)

the ring 10 stationary and the rail on that ring stationary, and have you shown the questions of friction and heat—the factors of heat and friction which you say are developed?

A. In that form that you just mentioned the bearing is used by the thousands all over the United States and you know that we are not having trouble with it.

Q. Will you please answer my question, Mr. Stallman?

A. That is the best I can answer it. There is no heat caused by friction.

Q. Have you ever tested, Mr. Stallman, a bearing such as [78] that in Fig. 1 of your patent 2334227 where the outer ring 10 and the rail 15 are stationary in the application?

A. Yes, I have tested lots of them myself.

Q. And did you determine the amount of heat generated in that bearing in any particular application?

A. When we determine heat, we determine relative heat of one application to the other; we do not attempt to establish the heat in temperature rise. We merely try to ascertain the heat of one construction against the other.

Q. Well, what is the heat factor by which you make your comparisons when the outer race ring 10 and rail 15 are stationary and when that same structure is rotating in an application? How do you make your heat determinations, and what are

(Testimony of Ralph F. Stallman.)

the readings from which you make the relative comparison?

A. When we are testing a bearing such as that we usually attach a thermometer to the case and measure the rise in temperature of the whole unit. The bearing is inside. We have no way of measuring the bearing, but if the unit does not heat up, we know that the bearing is not heating up.

Q. And have you tested, Mr. Stallman, a bearing such as that in Fig. 1 where the ring 10 and the rail 15 were rotating? A. Yes.

Q. And what were the heat readings that you found in that [79] test?

A. The bearing did not run long enough to satisfactorily build up heat readings. We could not measure the heat from that application. However, we have had that bearing in actual use in large diesel engines and it has had to be replaced because it would not perform satisfactorily.

Q. How many tests have you made, Mr. Stallman, of bearings such as that in Fig. 1 of your patent 2334227 where the ring 10 and the rail 15 were rotating in the application?

A. Oh, I have probably made 20 tests of my own.

Q. And how many tests have you made of a bearing such as that in Fig. 1 of your patent 2334227 where the ring 10 and the rail 15 were stationary?

A. Oh, I could say probably the same amount.

Q. And do I understand you are unable to give any statistics on heat generation as between the ten tests on one and the ten tests on the other?

(Testimony of Ralph F. Stallman.)

A. In the tests that I made the bearing was removed because it was erratic in operation; it had not built up temperature that we could measure, but if it was erratic in operation we know that it was not functioning properly and we know it was full of friction. [80]

* * * * *

A. No, I have no information on heat.

Q. (By Mr. Mueller): Do you have any information on friction generated in a bearing where the ring 10 with the rail 15 thereon is stationary, referring to your patent 2334227?

A. We have friction tests. There is one right there. We have numerous friction tests in the field, and the friction is so low we are not bothered with it.

Mr. White: May the record show that when the witness said, "The one right there," he was pointing to Plaintiff's Exhibit 5 for identification?

The Court: All right.

Q. (By Mr. Mueller): How do you establish, then, for purposes of comparison the friction conclusions that you have stated with a bearing installation with the ring 10 and rail 15 stationary? Upon what do you base your conclusions?

A. Friction is heat, and if there is no heat we are not particularly looking for friction. Now if the bearing wears out and we are forced to replace it, then we study the bearing for friction. We have had none of that to contend with.

(Testimony of Ralph F. Stallman.)

Q. Then do I understand you rely merely on a visual examination, Mr. Stallman?

A. No, we rely on the customers' field tests,—the performance of the bearing itself. [81]

Q. Have you yourself made any tests to determine the friction factor of ring 10 and guide rail 15 thereon stationary? A. No.

Q. Have you ever made any tests, Mr. Stallman, with a bearing such as that in Fig. 1 of your patent 2334227 where the ring 10 and the guide rail 15 thereon is in a rotating condition in the application? A. Yes.

Q. From that test which you made, how would you identify the friction factor from that test for that application?

A. By the erratic movement of the roll, by the smearing of the rail on removal for inspection, by the smearing and the wear on the roll parts.

Q. And did you visually examine the bearing that you had in such a rotating installation, Mr. Stallman? A. Oh, yes.

Q. How many tests did you make where you visually examined the bearing where the ring 10 and rail 15 of the bearing of Fig. 1 were rotating?

A. I made about ten tests and I examined all of them.

Q. And what did you do, Mr. Stallman, relative to the same bearing so that the rail 15 on the outer ring 10 was stationary? How did you compare those ten tests to which you have just testified? [82]

A. I would compare them only by inspecting

(Testimony of Ralph F. Stallman.)

their parts to see whether wear was occurring and see where to look for trouble, and, Mr. Mueller, might I remind you that not even——

The Court: No, no, don't get in any argument with the lawyer.

Ask the next question.

Q. (By Mr. Mueller): Over what period of time have you actually made tests from which you made visual examinations of the condition of the rail 15 on a ring 10 of the bearing Fig. 1 when that ring and rail were stationary?

A. Well, that goes back about 14 years.

Q. And the ten tests that you have made have been over a period of 14 years?

A. Yes, and we had our last test four years ago.

Q. Then do I understand you have not tested and examined a bearing such as that in Fig. 1 of your patent 2334227 with the ring 10 and rail 15 stationary for a period of four years?

A. Personally, no. I have reviewed many customers' applications.

Q. When did you last make a test as to that which would happen to a bearing such as Fig. 1 of your patent 2334227 when the ring 10 and the rail 15 were rotating in the application?

A. That is also about four years back.

Q. And the ten tests that you referred to, are they over a [83] period of some time, with the rotating ring and rotating guide rail, Mr. Stallman?

A. Yes.

Q. Have you tested any other bearings for fric-

(Testimony of Ralph F. Stallman.)

tion heat and any other operating characteristics that you observe with respect to the bearings of Fig. 2, 4 and 5 of your patent in suit?

* * * * *

A. Fig. 5, I have never made a bearing like that.

Q. (By Mr. Mueller): Have you ever made a bearing such as that in Fig. 4 of your patent in suit?

A. We have made these bearings with the outer member and the rail, but this Fig. 4 shows those two oil dams. We haven't made that.

Q. Have you ever made a bearing according to Fig. 2 of your patent 2334227? [84]. A. Yes.

Q. Did you test that bearing for heat and friction factors? A. Yes. [85]

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Mr. Mueller: If your Honor please, may I put large charts which are merely reproductions of the drawings of the patent without coloring on the easel, if I may?

The Court: Certainly.

* * * * *

Q. (By Mr. Mueller): Mr. Stallman, will you please refer to your patent and claim 3 of that patent. When your bearing according to claim 3 of your patent is moving in an installation and a skewed roller in the bearing is moved back into a straight line position, is that the effect of a bearing as defined in claim 3 of your patent?

A. Yes.

(Testimony of Ralph F. Stallman.)

Q. Is a straight line position in a moving installation of the bearing of Fig. 1, for instance, of your patent 2334227 a position such as the roller 10?

A. I do not see any roller 10.

Q. Such as the roller 12 shown in Fig. 1? What I would like to have you do is merely to identify, Mr. Stallman, what a non-skewed roller, a roller in a straight line position means [86] from the drawings of your patent 2334227.

A. You would have to refer to that view because we are looking at a roller in the direction of travel.

Mr. Mueller: Let the record show that when the witness points to that view, he points to Fig. 7.

Q. Then do we understand, Mr. Stallman, in a bearing according to your claim 3 of your patent a roller is in a straight line, alignment position, when it is in the position of the top roller of Fig. 7 of the drawings of your patent, and I refer to the top one of the three rollers in Fig. 7? Is that in alignment or straight line position? A. Yes.

Q. Has the skewing been cancelled in the roller in the position of the top roller in Fig. 7 of your patent? A. Yes.

Q. The second roller in Fig. 7, is that in a skewed position? A. Yes.

Q. And the third roller, is that in a straight line position? A. Yes.

Q. Would you say that the top and bottom rollers in Fig. 7 of your patent are shown as rollers where the skewing has been cancelled? A. Yes.

(Testimony of Ralph F. Stallman.)

Q. During the operation of the bearing, according to claim 3 of your patent, does a skewed roller such as the middle roller in Fig. 7 of the drawings go to a straight line, non-skewed position such as the top roller in Fig. 7 and the bottom roller in Fig. 7

A. Yes, when it contacts at A.

Q. And this correcting or cancelling of skewing occurs, as I understand it, in a bearing according to claim 3 while the installation continues to move, Mr. Stallman?

A. If the rollers are skewed, they drift endwise and correct themselves, that is true.

Q. That is, the rollers correct themselves to the top and bottom position in Fig. 7 from a skewed position of the roller in the middle while the bearing of your claim 3 continues to operate, is that correct?

A. Yes.

Q. Does a roller bearing with a race ring and a guide rail on that race ring fitting into a recess in the neck of the roller where the skewed rollers continue to remain skewed during operation, does that bearing come within claim 3 of your patent?

A. If the bearing is built according to my patent that could not happen. I can't answer that question.

Mr. Mueller: Will you please read the question, Mr. Reporter? [88]

(Question read.)

A. No, it would not remain skewed.

Q. That is, to come within claim 3 of your

(Testimony of Ralph F. Stallman.)

patent a roller bearing must cancel skewing, is that correct? A. Yes.

Q. Referring to claim 4 of your patent—and will you just please refresh your recollection of that—take a bearing according to claim 4 of your patent: Does a bearing as defined in claim 4 cancel skewed rollers during the operation of the bearing so that the rollers come to a straight line position while the bearing continues to operate? A. Yes.

Q. And the straight line position, is that shown in the top roller and the bottom roller in Fig. 7 of your patent 2334227? A. Yes.

Q. Considering a roller bearing, Mr. Stallman, that is, a race ring with a guide rail on the race ring, and that guide rail fitting into a recessed position in the roller in the bearing, now, if the rollers in that bearing stay skewed during operation, does such a roller bearing come within claim 4 of your patent?

A. The roller could not stay skewed. I can't again—if they stayed skewed. They won't stay skewed. [89]

* * * * *

Q. (By Mr. Mueller): Mr. Stallman, a roller bearing which has a race ring and rollers therein with a guide rail on the race ring fitting into recesses in the rollers, if that bearing in operation does not cancel skewing in the rollers in the bearing, does that bearing come within your invention as you claim it in your patent?

A. Such a bearing I would have nothing to do

(Testimony of Ralph F. Stallman.)

with. My bearings never acted that way. I can't understand what you are trying to get at.

Q. Mr. Stallman, if a roller bearing of a construction such as Fig. 4 of your patent 2334227 does not cancel skewing when the rollers in that bearing skew, then does such a bearing come within what you claim to be your invention?

The Court: That is just another way of asking him if it does not work, it is no good.

Mr. Mueller: If your Honor please, we will show that it will work. We are trying again to find out if in fact it works successfully.

Mr. White: If your Honor please, if they are going to show it, why don't they show it without torturing this witness, a plain man, with hypothetical questions?

The Court: It is very difficult for me to follow these questions.

Mr. Mueller: If your Honor please, as you can see our [91] problem, on his direct testimony he said that a bearing according to his patent and his claimed invention cancelled skewing.

The Court: That is right.

Mr. Mueller: And I am trying to find out whether a bearing of the construction which I identified, which does not cancel skewing, if that comes within the invention that he described this morning in his testimony.

The Court: Of course, I think he would say no to that, wouldn't he?

(Testimony of Ralph F. Stallman.)

Mr. Mueller: I am asking him, your Honor, if he does or does not.

Mr. White: We object to that. It is totally immaterial what he thinks as to his patent. His patent still speaks for itself and is subject to argument as to what the scope of the claims are, what is in it and what is outside of it. Counsel merely argues with the witness at the present time as to the scope of the claims.

Mr. Mueller: If your Honor please, I believe it is just as simple, that as a litigant who has been sued, I think we are entitled to know from the patentee who is bringing the suit, particularly when he testified, I think we are entitled to know what his invention is.

The Court: Of course. There is no doubt about that.

Mr. Mueller: That is the purpose of this cross-examination, [92] your Honor, and entirely that, and I believe this is a proper line of questioning, which is not in any way torture, your Honor. I do not want to do that, I can assure you.

The Court: I think the line of examination is all right but it may well be the form in which you put the question is objectionable.

Mr. Mueller: I am trying to get it so there can be no confusion in the record, your Honor. I appreciate the difficulty, and I will certainly make every effort to keep it clear. I appreciate your comments.

Mr. White: In order to keep the record straight,

(Testimony of Ralph F. Stallman.)

your Honor, we want the record to show that it is entirely incompetent, irrelevant and immaterial what the opinion and feeling of a patentee is with respect to the invention of a particular patent. No matter what he says, the patent speaks for itself, and on that basis we object to it.

The Court: Except, Mr. White, it is perfectly competent cross-examination since you examined the plaintiff with respect to the purposes and objects of his invention, and what the so-called evil was that he claims his invention corrected. So it is within the realms of legitimate cross examination to inquire into that. It may be the particular form of the question is rather technical.

Mr. White: I did not examine this witness as to the scope of the claims, and it is entirely outside the scope of [93] the cross examination to examine him as a layman on a highly technical proposition as to the scope and meaning of the claims, what is within it and what is not. He was not examined on that, and that is outside the scope of the direct.

The Court: State the question again that you want.

Mr. Mueller: I will, sir, and will you please note that I did not use the claimed language. I tried to avoid making it complicated.

The Court: Will you state it again?

Mr. Mueller: I will, sir. Thank you.

Q. Mr. Stallman, referring to a bearing of the construction of Fig. 4, only for the purpose of suggesting a structure to you, will you please consider

(Testimony of Ralph F. Stallman.)

that bearing or consider a bearing with a race ring having a guide rail on the race ring, rollers within the bearing, with each roller having a recess into which the guide rail fits, on operation of the bearing which I have described the rollers skewed; now, if those rollers stayed skewed during the operation of the bearing—and please refer to the bearing which I described, and I am not now confining it to Fig. 4—on the bearing that I described, if the rollers stayed skewed, is that bearing within the invention which you are claiming?

A. If they stayed skewed for the thousandth part of a second, yes, but if they stayed skewed any longer I would have to think that one out a long time before I could answer [94] that.

The Court: Well, you don't really mean that, do you? If they stayed skewed, then it wouldn't be the thing that you were trying to cover.

Q. (By Mr. Mueller): I didn't put any time limitation, Mr. Stallman. I said that they stayed skewed—the roller stayed skewed during the operation of that bearing.

A. I can't get the sense to the question because the bearing would destroy itself; there would be no bearing to talk about.

Q. Will you please take the bearing which I gave to you——

A. I have it.

Q. I merely started on page 4, Mr. Stallman, to help you. I asked you if you would consider a bearing that had a ring with a guide rail on it, with a guide rail fitting into recesses in the rollers,

(Testimony of Ralph F. Stallman.)

and during the operation of those rollers in that bearing which I described to you those rollers skewed as a result of load factors in the installation. Now if those rollers stay skewed, and the skewing is not cancelled during operation, does that bearing which I have described to you, then the claimed invention in your patent—— [95]

* * * * *

A. If that bearing that you speak of is in the description that you just gave me, it is within the patent. I don't know how it will perform.

Q. (By Mr. Mueller): I beg your pardon? If it is——

A. I say if the bearing is as you describe it, it is within this patent.

Q. Then do I understand, Mr. Stallman, that you claim as your invention a roller bearing which has a race ring, a guide rail on the inside of that race ring fitting into recesses in rollers in the race-way of the bearing—do I understand that you claim as your invention such a bearing whether the rollers stay skewed or the skewing in the rollers is cancelled.

A. If the bearing has the clearances shown in my drawing, it is in here. I can't answer the other question. I can't conceive of that thing happening, so I can't answer your [96] question.

Q. Will you please just think. You have had experience, have you not, Mr. Stallman, with many types of roller bearings?

(Testimony of Ralph F. Stallman.)

A. Yes, and what you mentioned cannot happen in this bearing. That is what I don't understand.

Q. Well, would you please follow my question, Mr. Stallman, and try to answer just my question. In brief, the end result that I gave you in my question is this: If the roller in that structure stays skewed during the operation of the bearing, as I understand it you say it is within your invention; is that correct? If the roller stays skewed and is not corrected, then in the roller bearing which I described it comes within your patent?

A. I can't say yes or no. This bearing was made and approved long before the patent was applied for. You are twisting something up and I can't understand it.

Q. Mr. Stallman, I will try to make it just as simple as I can. Do we understand one another that you testified that a bearing according to your invention while operating corrects skewing in the rollers with that bearing; is that correct?

A. It has in hundreds of thousands of cases, and you know that.

Q. Will you please answer my question, Mr. Stallman? A. Yes, it is true. [97]

If the skewed roller is brought back into alignment so the skewing is cancelled, then it comes within your invention; is that correct? A. Yes.

Q. Now if a bearing with exactly the same structure—an outer race ring, a rail on that race ring fitting into rollers with recesses in the rollers—if such a bearing is operating and the rollers stayed

(Testimony of Ralph F. Stallman.)

skewed so that the skewing is not cancelled, does that bearing come within your invention?

A. The structure does. I would like to see the job to see what you are getting at.

Q. Will you please take the question as I have given it to you and refer to your testimony on the operation that you get from a bearing according to your invention?

A. Mr. Mueller, I can't answer that question.

Q. Then you cannot tell us whether a roller bearing such as I have described where the rollers stay skewed—you cannot tell us as to whether or not that is within your invention, do I understand you correctly?

A. I would have to see the bearing and then I could tell you.

Q. Then would you like to correct, Mr. Stallman, your testimony, or change your testimony as to what constitutes the invention of your patent? You testified this morning as to the results you get from a bearing according to your invention. Now would you like to tell us what is the result you get so far as skewing is concerned in a bearing of your invention?

A. My results have been that for 20 years there was no bearing available on the American market until this one came along. This one corrected the problems. You know that as well as I do; we have no more trouble with this bearing. [99]

* * * * *

Q. (By Mr. Mueller): Mr. Stallman, will you

(Testimony of Ralph F. Stallman.)

please take any figure of your patent 2334227 which you wish and point out, identifying the structure of the figure—point out what you say is the invention of your patent 2334227.

A. Figure 1 is the popular version. Now the things you speak about could not happen in Figure 1 unless the machine itself was in such a dilapidated condition——

The Court: Well now, you are not answering the question; you are making a speech about it. He just asked you to describe your invention according to Figure 1.

A. This bearing if used according to the patent would not permit that skewing to continue. [100]

Q. (By Mr. Mueller): Then do I understand, Mr. Stallman, in the roller bearing of your invention skewing of rollers does not continue during the operation of your bearing?

A. Correction of skewing occurs. Skewing might continue, but——

The Court: Well, you would have to have skewing in order to correct it?

A. That's right.

The Court: Both of you fence too much about it.

The Witness: You might correct it to a minor degree or you might correct it completely, but it is still being corrected.

The Court: An invention wouldn't be worth a tinker's darn, would it, unless you had something there to be corrected; isn't that right?

A. That is right.

(Testimony of Ralph F. Stallman.)

Q. So the thing has to be there before it is subject to correction? A. That's right.

Q. So if it corrects skewing, you assume that there is going to be some skewing there but that this device—the structure of this device would accomplish some remedy of that; right? A. Yes.

The Court: That is what I understood him to say before. [101] Now you go ahead, counsel. I just interrupted because I thought you were fencing.

Mr. Mueller: I appreciate it, your Honor. I would like to be helped.

Q. Mr. Stallman, may we again take this question. Skewing, as you have testified with respect to the bearing of your patent. Now, if the rollers in your bearing skew, does the structure of your bearing straighten out those rollers during operation so that they no longer skew? A. Yes.

Q. Now if we have a roller bearing with rollers with recessed necks and a guide rail on the ring of that bearing, if in that bearing during operation the rollers skewed and instead of going back to alignment, instead of having the skewing cancelled, if that skewing continues during operation of that bearing, does that bearing come within the invention of your patent?

A. If I visualize a very minor skewing, I will answer yes.

Q. What would you consider a minor skewing?

A. One in which the friction was not sufficient to disturb the bearings. That condition exists.

(Testimony of Ralph F. Stallman.)

Q. If the skewing continues in the roll bearing during operation, does that have anything to do with the results which you claim for your invention in your patent?

A. It makes my bearing work harder but it is working toward a correction all of the time.

Q. If during operation of that bearing the rollers don't return to straight line position, the skewing isn't cancelled, is that a bearing according to your patent?

A. If the skewing is correct, it is a bearing according to my patent.

Q. If the skewing is cancelled out or corrected, then it comes within your patent?

A. That's right.

Q. But if the skewing is not corrected or cancelled, then do I understand that roller bearing does not come within your patent? Is that correct?

A. We could say that. I remind you I am just saying this because I am getting tired, getting weary; I can't stand it.

Q. Then I understand that when skewing is not corrected, is not cancelled, then that roller bearing when it is operating, it does not come within your patent; is that correct?

A. If my patent reduces the degree of skewing, it is still within my patent.

Q. Mr. Stallman if you will please refer to the file history of your patent again to the amendment dated February 17, [103] 1942—

* * * * *

(Testimony of Ralph F. Stallman.)

Mr. Mueller: I am referring to the file wrapper or file history. I beg your pardon, Mr. White; yes, paper No. 5. I wasn't looking. Yes that is correct.

Q. Will you please take page 2 of that amendment of February 17, 1942 and do you please read all of page 2 to yourself, Mr. Stallman, just to refresh your recollection? A. Yes.

Q. As I understand the statements on page 2 of that amendment, you are distinguishing your bearing from a bearing in a patent to Heim, 1885914; is that correct?

A. I presume that is the right number. [104]

* * * * *

Mr. Mueller: If your Honor please, I would like to note of record now that out of the prior patents set up in our answer we will rely for anticipation on the following:

The Zahn British patent, 17841 of 1906;

The Kentner United States patent, 585580 of June 29th, 1897;

The Heim U.S. patent, 1885914 of November 1st, 1932;

The Rydback U.S. Patent, 1979707 of November 6th, 1934; and the remainder of the patents will be relied upon to show the state of the art.

Q. (By Mr. Mueller): Mr. Stallman, I call your attention to Plaintiff's Exhibit 5 which is the test apparatus you employed to demonstrate to the jury the loading of a bearing to cause skewing and binding of the bearing rollers. Do you consider such an apparatus as your Plaintiff's Exhibit 5 satisfactory

(Testimony of Ralph F. Stallman.)

to demonstrate the way in which misalignment or skewing can be caused? A. Yes. [122]

Q. Mr. Stallman, do you consider the terms "skewing" and "misalignment of bearing rollers" to mean the same thing?

A. In the way we are talking about it here, yes.

Q. In the bearing of your patent, Mr. Stallman, must the raceway in which the roller guide rail is carried be stationary?

A. It operates in that manner much better than the other manner.

Q. Will you please answer the question yes or no? A. Yes.

Q. On direct examination, Mr. Stallman, you testified that in 1948 Mr. Crosby, one of the defendants, suggested that you see Mr. McGill in Valparaiso, is that correct? A. Yes.

Q. Is that the first time you discussed your bearing with Mr. McGill, and will you please answer yes or no? A. Yes.

Q. Did you ask McGill Manufacturing Company as early as 1945 to manufacture an order of your bearings for you?

A. I would have to refresh my memory on those dates.

Q. I hand you a letter dated April 25th, 1945, marked for identification Defendant's Exhibit D, and ask you whether that is your signature. That is a photostatic copy of a letter?

A. This is my signature.

Q. Did you write the letter which you have in

(Testimony of Ralph F. Stallman.)

your hand [123] marked for identification Defendant's Exhibit D? A. Yes.

Q. Did you in that letter discuss your bearing with the McGill Company?

A. This letter would speak for itself.

Q. Have you read the letter, Mr. Stallman?

A. It is so long ago I will have to refresh my memory on it.

Q. Will you please read it?

A. Did you want this read?

The Court: He just wants you to look at it because, I suppose, he wants to ask you a question.

The Witness (After perusing the document): Yes.

Q. (By Mr. Mueller): Is that letter a request to McGill to manufacture a bearing according to your patent 2,334,227, and the letter I refer to is that of April 25th, 1945 from you to McGill Manufacturing Company? A. Yes.

* * * * *

Q. (By Mr. Mueller): I hand you three prints collectively marked for identification Defendant's Exhibit E. Will you please tell me what they are?

A. These are prints of a bearing that was for the California Press Manufacturing Company, and I sent this to the McGill Company and others asking if they would manufacture these bearings before I got into the manufacture out here, and they did not manufacture them.

Q. About what date, Mr. Stallman, did you send these three prints which you have identified marked

(Testimony of Ralph F. Stallman.)

for identification as Defendant's Exhibit E? When did you send those to McGill, approximately?

A. These prints are marked May 22, 1945. I imagine it was very close to that time.

Q. These prints which you sent to McGill, possibly in April or probably in April 1945, marked for identification Defendant's Exhibit E, do these show parts of your bearing and a bearing assembly according to the bearing of your patent 2,334,227?

A. Yes.

* * * * *

Q. (By Mr. Mueller): Mr. Stallman, in 1945 did you discuss with the McGill Manufacturing Company a bearing according to your patent 2,334,227? [125]

A. I can't recall ever having been at the McGill plant prior to my meeting with Mr. Crosby.

Q. I hand you two letters, one dated May 16th, 1945 addressed to the McGill Manufacturing Company, and ostensibly from you, R. F. Stallman, and a carbon copy of a letter dated May 25th, 1945, ostensibly from Charles S. McGill to R. F. Stallman of the two letters marked for identification Defendant's Exhibit F, and will you just read them to yourself, please, sir?

A. Yes, these look all right.

Q. Is that your signature on the letter of May 16th, 1945? A. Yes.

* * * * *

Q. (By Mr. Mueller): Mr. Stallman, does your letter of May 16th, 1945 in the two-letter collection

(Testimony of Ralph F. Stallman.)

of Defendant's Exhibit F refer to a visit to the McGill Company prior to May 16th, 1945?

A. That correspondence indicates a visit, but that must have been after the visit I had with Mr. Crosby. I can't [126] recall having been back to contact McGill prior to that Crosby contact. I will have to refresh my memory on the correspondence. It goes back further than I thought.

Q. This letter, Mr. Stallman, of May 16th, 1945, which you are writing to Mr. McGill, states:

"My sample bearings were left with you for study, and I now have occasion to use the small pressed seal sample."

Does that refresh your memory in any way as to a visit prior to 1948 at the McGill Company?

A. It is a visit prior to 1948, yes.

Q. When was the visit to which you have just referred prior to 1948 in your last answer?

A. From that correspondence it would be 1945.

Q. Do the sample bearings to which you refer in your letter of May 16th, 1945 refer to bearings made in accordance with your patent 2,334,227?

A. Yes.

Q. Did McGill Manufacturing Company in 1945 in fact bill some bearings for you in accordance with your patent 2,334,227?

A. No, not that I can recall.

Q. I hand you a letter dated September 18th, 1945 marked for identification Defendant's Exhibit G. Will you please tell me what it is? [127]

(Testimony of Ralph F. Stallman.)

A. These are the same bearings that were covered in the prints that we just discussed.

Q. Will you please tell me what the letter is or the copy of the letter is that I just handed to you, Mr. Stallman, marked for identification Defendant's Exhibit G?

A. Well, they state here that they have shipped 112 bearings to the California Press Company which they manufactured apparently from this correspondence at a loss, and that they are developing a new bearing of their own.

Q. Do you know what that shipment referred to in that letter may be so far as construction of a bearing?

A. It appears to be a shipment of 112 bearings such as the drawings we just discussed, which is a double-row bearing.

Q. Are those bearings which were discussed in the letter to you of September 18th, 1945 bearings coming within your patent 2,334,227? A. Yes.

Q. Were those bearings 112SK7691 bearings which you ordered from McGill Manufacturing Company in 1945? A. Yes. [128]

* * * * *

Q. (By Mr. Mueller): After the purchase of bearings from the McGill Company in 1945 in accordance with your patent 2,334,227 did you have any other contact with McGill prior to the visit in 1948 to which you referred on your direct examination? A. Not that I can recall.

Q. Did you have any correspondence with the

(Testimony of Ralph F. Stallman.)

McGill Company prior to your visit in 1948 concerning the bearing of your patent 2,334,227?

A. Yes, that that you have cited is correspondence.

Q. Did you have any correspondence with the McGill Company between 1945, the correspondence which you have testified to, and the summer of 1948, concerning your bearings?

A. Yes, I had correspondence, that same material that you are pointing out there now. Just how much I can't recall. It is a long time ago.

Q. By pointing out, Mr. Stallman, you mean the correspondence which you have already identified in 1945? I am just trying to clarify your answer.

A. I have corresponded with a number of other bearing companies, but it is not clear in my mind after all this time just what correspondence there was.

Q. That is, you do not recall having any correspondence with McGill prior to 1945 and 1948, then, is that correct? [129]

A. Well, If I corresponded in 1945 and again in 1948, there may have been some in between. [130]

* * * * *

Q. (By Mr. Mueller): You testified on direct examination that your trip in 1948 to Valparaiso on the talks with the McGill officials terminated in a contract; is that correct? [131]

A. Yes, I secured a contract from McGill.

Q. And that document which you refer to as a

(Testimony of Ralph F. Stallman.)

contract is Plaintiff's Exhibit 6 (showing to witness)?

The Court: He has already covered that, counsel. He has already said that.

Q. (By Mr. Mueller): Was this arrangement represented in the letter of June 20th, 1948 with McGill a tentative or a permanent arrangement?

The Court: Counsel, doesn't the document show what it is?

Mr. Mueller: I beg your pardon?

The Court: Is it ambiguous? Doesn't the document itself show what it is?

* * * * *

Q. (By Mr. Mueller): Was the arrangement which you had with McGill tentative or permanent, referring to the letter of June 20, 1948, Mr. Stallman?

A. To my understanding, it was permanent.

Q. Did you, subsequent to June 20, 1948 have correspondence [132] back and forth with McGill concerning the letter of that date and concerning the arrangement in that letter?

A. You are going back so far that I would have to review that. I can't state from memory. [133]

* * * * *

Q. (By Mr. Mueller): In conferences in the spring of 1950 with you in Valparaiso, Indiana, Mr. Stallman, did the McGill Company question the validity of your patent?

A. Not that I can recall.

Q. Did you have conferences with the McGill

(Testimony of Ralph F. Stallman.)

Company concerning the arrangements in the letter of June 20, 1948 in the year 1950?

A. I had several conferences after that agreement was made.

Q. In July 1950 did you get a copy from the McGill Company of an opinion from its counsel dated June 17, 1950 on the matter of your patent 2,334,227?

A. Yes, I recall an opinion coming through on it. [134]

* * * * *

Q. (By Mr. Mueller): Did the McGill Company transmit to you the opinion of their counsel with a letter dated June 29, 1950?

A. I received an opinion; I am hazy on the date.

Q. I am merely handing you this letter to refresh your recollection and I will include that. That is correspondence [135] between you and McGill, Mr. Stallman?

A. I received that letter. [136]

* * * * *

Mr. Mueller: That is all the cross examination.

Mr. White: There is no redirect examination.

The Court: You may step down.

Mr. White: The next witness, your Honor, is Mr. Crosby, the defendant.

T. W. CROSBY

one of the defendants, called as a witness by the plaintiff; sworn.

(Testimony of T. W. Crosby.)

Q. (By the Clerk): Will you please state your name to the Court and to the jury, sir?

A. T. W. Crosby.

Direct Examination

Q. (By Mr. White): Mr. Crosby, will you state your occupation?

A. President of the Bearing Specialty Company.

Q. You heard Mr. Stallman testify yesterday and today? A. Yes, sir.

Q. And you know Mr. Stallman personally?

A. Yes, sir.

Q. When he stated that you were related by marriage to one [138] of the Mr. McGills of the McGill Company, that is the truth, is it?

A. Yes, sir.

Q. And it is also the truth that you are the president of the Casey Bearing Company, the defendant in this case? A. Yes, sir.

Q. Is it also the truth that he had a conference with you in an automobile in front of your place about this patent and when he had it?

A. Yes, sir.

Q. And is it also true that you suggested to him to go to McGill and to show it to them?

A. Yes, sir.

Q. And subsequently you don't know what went on between him and the McGills back East?

A. I had no connection with it.

Q. No connection with that, but as an ultimate result subsequently to your own knowledge McGill

(Testimony of T. W. Crosby.)

started to manufacture Guiderol bearings, is that right? A. Yes, sir.

Q. And those Guiderol bearings ultimately were sold by your company and by you on the Pacific Coast? A. Yes, sir.

Q. And those Guiderol bearings are the same bearings that are shown here in Plaintiff's Exhibit 5-A. [139]

Mr. Mueller: If your Honor please, there have been no sets established as to this testimony that I heard.

Mr. White: He heard the testimony of Mr. Stallman, your Honor.

Mr. Mueller: I mean to establish the period. What period are we talking about in Mr. White's examination of Mr. Crosby?

Mr. White: We are talking here, if you understand, about the period between your first meeting with Mr. Stallman—was that the first meeting that you had?

A. In regard to the Guiderol bearing.

Q. Did you know him before that date?

A. Yes, sir.

Q. And in what connection?

A. As a business connection in the bearing business.

Q. In the bearing business?

A. Relative to the bearing business, yes, sir.

Q. And prior to that connection, did you ever see or sell any bearing which was made similar to this Guiderol bearing? A. No, sir.

(Testimony of T. W. Crosby.)

Q. And do you remember approximately the year in which that meeting took place between you and Mr. Stallman?

A. I would say approximately 1947 or '48; along in there, approximately.

Q. Did you know whether Mr. Stallman had any previous [140] correspondence or connection with McGill?

A. No, sir.

Q. You didn't know that. We are talking now about the period subsequent to your meeting with Mr. Stallman on all these matters that I am asking you. I show you here Defendant's Exhibit 5-A. Can you identify that as a bearing that was sold by you—a Guiderol bearing sold by you?

A. Yes, sir.

Q. You have several branches on the Pacific Coast of the Casey Bearing Company, don't you, Mr. Crosby?

A. Yes, sir.

Q. There is one in Los Angeles?

A. Yes, sir.

Q. There is one in Glendale? North Glendale?

A. Maywood.

Q. And there is one over in Oakland. And as I understood at the time of your deposition, all these branches report in to the main office of Casey Bearing Company as to their sales.

A. Yes, sir.

Mr. White: I believe the questioning could be avoided and abbreviated. Counsel furnished me here with a number of catalogues which are used in connection with the sale of Guiderol bearings by Casey Bearing Company, and if counsel stipulates to their

(Testimony of T. W. Crosby.)

admission I could offer each of them in [141] evidence at this time. [142]

* * * * *

Q. Isn't it true, Mr. Crosby, that originally the predecessor company of Casey Bearing Company was owned by McGill Manufacturing Company, the manufacturers of these bearings?

A. Well, not originally.

Q. Not originally? A. No.

Q. That's right; prior to your ownership—immediately prior to your ownership McGill owned it; is that right? A. That's right.

Q. Which means that the stocks of the company were sold to you and to your partners by the same McGill Company who manufactures the Guiderol bearings? A. Yes.

Mr. White: If your Honor please, counsel graciously stipulated to the fact that actual notice of infringement was sent out by a letter under date as it appears in the complaint, the date of the letter. [144]

* * * * *

Cross Examination

Mr. Mueller: I just have one question, Mr. Crosby. Did you do anything beyond the ordinary duties of an officer of a corporation so far as the sale of the Guiderol bearings are concerned?

A. Would you repeat that, please?

Q. Did you do anything other than the ordinary duties of an officer of a corporation so far as the

(Testimony of T. W. Crosby.)

sale of Guiderol bearings are concerned by Casey Bearing Company? A. No, sir.

Q. (By Mr. White): Mr. Crosby, you solicit customers for yourself, don't you, for these bearings personally? A. Yes, sir.

Q. And you go out as a salesman and sell the bearings? [145] A. Yes, sir.

Q. And then you just act as a salesman for Guiderol bearings, is that right? A. Yes, sir.

Q. (By Mr. Mueller): This solicitation, Mr. Crosby, is merely as an officer and employee of the Casey Bearing Company; is that correct?

A. Yes, sir.

The Court: What he is trying to bring out is that you didn't do any business in your own right personally.

A. Oh, no.

Q. This was company business that you were doing? A. Absolutely.

The Court: Is that what you want to bring out?

Mr. Mueller: That is it, sir. Thank you. [146]

* * * * *

Mr. White: If your Honor please, may we recall Mr. Crosby for a few more questions?

Q. Mr. Crosby, when your attorneys rendered an accounting, you gave them Guiderol bearings which were sold out of stock by you or by your company either here or in Los Angeles; you furnished that to them, didn't you? A. Yes.

Q. That accounting only covers the Guiderol bearings which were sold directly out of your stock,

(Testimony of T. W. Crosby.)

which you are keeping in stock in the various companies, is that correct? A. Yes.

Q. In addition to that, you are doing business in the sale of Guiderol bearings which you do not sell out of stock, is that right? A. Yes, sir.

Q. How do you do that business?

A. We submit the order.

Q. You take the order first, don't you?

A. Sometimes we do; sometimes we do not, but it is submitted directly to McGill Manufacturing Company.

Q. Who submits it?

A. If it goes through our hands, if the purchase order is sent to us in the name of McGill Manufacturing Company, we submit it to McGill and they can either accept or refuse the order, and they do the billing and ship direct, and we [147] never handle the merchandise at all.

Q. But you get a commission on it, don't you?

A. Yes.

Q. You solicit those orders, don't you?

A. Yes.

Q. So you solicit the orders and then it is sent back to the company for approval or rejection, and then they accept, they fill the order and give you a commission?

A. Yes, and they do the billing.

Q. Isn't it true that the quantity of those Guiderol bearing sales which you solicited in the manner you have last described is much greater than the sale of the Guiderols out of stock?

(Testimony of T. W. Crosby.)

A. As a general rule. [148]

* * * * *

A. Yes.

Q. (By Mr. White): For instance, you have one customer in Los Angeles, McCullough?

A. McCullough Motor Comany.

Q. Isn't it true the sales of that exceed 7,000 bearings a month?

A. I couldn't answer that. I don't know.

Q. Didn't you testify in your deposition all the invoices from the Los Angeles office came through your hands in San Francisco? A. Yes, sir.

Q. And you do not recall as to the volume at all?

A. I couldn't recall the quantity, Mr. White; no, sir.

Q. Would you say it runs into the thousands a month? A. How many?

Q. It runs into the thousands of bearings a month.

A. I can't answer that because I don't know. I would say approximately yes, it probably would.

* * * * *

Mr. White: The plaintiff rests.

VIRGIL A. HOFFMAN

called as a witness on behalf of the defendant, sworn.

Q. (By the Clerk): Will you please state your name to the Court and to the jury, sir?

A. Virgil A. Hoffman.

(Testimony of Virgil A. Hoffman.)

Direct Examination

Q. (By Mr. Mueller): Will you state your age and residence, Mr. Hoffman?

A. 39 years old. I live 2239 South Ayers Avenue, Los Angeles, California.

Q. Could we fix that so it is a little more comfortable? May we remove some of these exhibits?

The Court: Surely.

Q. (By Mr. Mueller): What is your occupation, Mr. Hoffman?

A. I am the vice-president and general manager of the Southern Division of the Bearing Specialty Company.

Q. Is Bearing Specialty Company the successor of Specialty Bearing Company, the defendant in this case? A. Yes.

Q. Would you classify your company as a [152] distributor of different products and a representative for manufacturers of products?

A. Yes, sir.

Q. In other words, you would be a distributor and manufacturers' representative; would that be the classification of the company by whom you are employed? A. That is right.

Q. How many manufacturers do you represent in one of those two capacities in your company, Mr. Hoffman? A. Fifteen, I would say.

Q. Can you identify the different types of products sold by your company in one capacity or another?

A. Yes, we handle ball bearings, straight roller

(Testimony of Virgil A. Hoffman.)

bearings, the type to as needle bearings, tapered roller bearings, roller chain and sprockets, oil steels, oil rings, industrial retaining rings, and that pretty well covers it.

Q. Is McGill Manufacturing Company of Valparaiso, Indiana, just one of the fifteen accounts which your company handles? A. Yes, sir.

Q. Is the bearing identified by the trademark Guiderol just one of different types of bearings which you sell? A. Yes, sir.

Q. How long have you been associated with Bearing Specialty Company or its predecessor?

A. 1947 I started there. [153]

Q. In the period from 1947 to date, what in general have been your duties, Mr. Hoffman?

A. I was a salesman from 1947 until August of 1950, at which time I was made the branch manager in Los Angeles, but I continued to act as a salesman as well as manager, and in just this past year I was made general manager and vice-president, and continued to sell.

Q. Had you any experience in the bearing field prior to 1947?

A. Yes, sir, I worked for Pacific Bearings in Los Angeles from, I think, 1942 until 1947.

Q. What in general were your duties at Pacific Bearing Company in the period from 1942 to 1947?

A. Well, to take and solicit orders. I worked on the order desk, telephone order desk, and then out selling for them.

Q. Can we say, then, Mr. Hoffman, that con-

(Testimony of Virgil A. Hoffman.)

tinuously since 1942 you have been selling anti-friction bearings of one type or another?

A. That is right, sir.

Q. Has your work in selling bearings been entirely in the Los Angeles area since 1942?

A. Yes, sir.

Q. Is the bearing which I show you, marked for identification Defendant's Exhibit I, one size and type of Guiderol bearing in the form in which you sell it? [154]

A. Yes, sir.

Mr. Mueller: I might say, Your Honor, so there will be no misunderstanding, we have an inner ring that I want the witness to identify, and it won't fit into the larger size bearings, but I will tie the two together.

Q. Does the bearing marked for identification Defendant's Exhibit I correspond except for size to the bearings Plaintiff's Exhibit 5-A before you?

A. Yes, sir.

Q. Is the bearing marked for identification defendant's Exhibit I representative of all Guiderol bearings which you sell in an assembly of an outer race ring and rollers?

A. Yes, sir.

* * * * *

Q. (By Mr. Mueller): When you sell a Guiderol bearing such as Defendant's Exhibit I, is there any movement in the parts of that bearing at the time you sell it?

A. No, sir. [155]

Q. The movement in the parts of a Guiderol bearing such as that, Defendant's Exhibit I, occurs after installation of the bearing, is that correct?

(Testimony of Virgil A. Hoffman.)

A. Yes, that is right.

Q. Is it a fact that any skewing of the rollers due to the operation of the bearing such as Defendant's Exhibit I occurs after installation of the bearing?

A. Yes.

Q. Have you yourself actually made the sales of Guiderol bearings as represented in the model Defendant's Exhibit I?

A. Yes, sir.

Q. Did you ever sell and deliver a Guiderol bearing to a customer of your company with the inner ring assembled in the outer race ring?

A. Very seldom we ever do.

Q. Is this that I hand you marked Defendant's Exhibit J an inner ring such as would fit into the outer race ring assembly of a Guiderol bearing, such as Defendant's Exhibit I?

A. That is right, sir.

Q. Will you, Mr. Hoffman, for the Court and the jury, merely show that? The inner race ring will slip in and out of the outer bearing race ring, and we are referring to the items Defendant's Exhibit J and the inner ring marked for identification Defendant's Exhibit I.

A. Yes, sir. [156]

The Court: I did not understand this. He only sells the outer ring? He does not sell the inner ring?

Mr. Mueller: No, he sells the inner ring, but the inner ring may be sold separately from the outer ring.

The Court: All right.

Mr. Mueller: And this happens to fit. They were

(Testimony of Virgil A. Hoffman.)

chosen as representative so they would show the inner and outer race ring assemblies.

* * * * *

Q. (By Mr. Mueller): Over the past four years can you estimate the number of Guiderol bearings your office has sold with inner rings and outer ring assemblies such as those, Defendant's Exhibits I and J?

A. When they are assembled together?

Q. Yes, where they are assembled together.

A. Well, I would say we sold about 50 assembled units.

Q. That is where the inner race ring such as Defendant's Exhibit I was actually included at the time of sale within the outer race ring assembly, such as Defendant's Exhibit J? [157] I am sorry.

The Court: J is the inner ring.

Q. (By Mr. Mueller): At least it is the inner ring and the outer race ring assemblies, J and I, which you have before you, Mr. Hoffman.

A. I would say we only sold about 50 sets assembled together in the past four or five years.

The Court: The great majority of them are sold separately?

A. That is right.

Q. (By Mr. Mueller): Do you ever sell to bearing customers an inner ring such as Defendant's Exhibit J separately from the outer ring assembly?

A. Yes, we do.

Q. Can you estimate approximately the number of inner rings which you sell relative to the number

(Testimony of Virgil A. Hoffman.)

of outer ring assemblies such as the model, Defendant's Exhibit I?

A. Well, assuming that our sales of the bearing only are 100 per cent, I would say we sell about 20 per cent of that portion that we sell inner races for.

The Court: You sell 20 per cent of the inner ring separately, is that what you are saying?

A. No, I say if we sell, say, 100 bearings, we would only sell 20 inner races, whether they were at the same time or subsequent. [158]

Q. 80 per cent of the business is the outer ring?

A. The outer ring and rollers, yes, sir, your Honor.

Q. (By Mr. Mueller): Can an inner ring such as the ring Defendant's Exhibit J be used with an outer ring bearing assembly other than Guiderol bearings?

A. Yes, we use these in our standard multi-roller bearings.

Q. And so the jury will thoroughly understand and the Court—I am sure you do—this inner ring, Defendant's Exhibit J, will go into other bearings than the outer assembly, Defendant's Exhibit I, is that correct?

A. Yes, we have been selling those for many years before that.

Q. Can an inner ring such as Defendant's Exhibit J be used with bearings of manufacturers other than the bearings of McGill Manufacturing Company?

A. Yes, sir.

(Testimony of Virgil A. Hoffman.)

Q. It is just a matter of size, is it, Mr. Hoffman?

A. Well, everybody makes a bearing with these envelope dimensions, and this race will fit into any other dimensional interchangeable bearing of that type.

Q. By envelope you mean the outer race ring assembly?

A. Yes. In other words, what you would consider your outside diameter, the width of the bearing, your total width of the bearing, then what would normally be the inside diameter of the rollers or the shaft size or the o.d. of the [159] inner race.

Q. The o.d. means the outer diameter, Mr. Hoffman? A. That is right.

Q. In your answer you were referring to a bearing assembly such as Plaintiff's Exhibit 5-A and Defendant's Exhibit I.

A. That is right, sir.

Q. Do bearing manufacturers generally have standard sizes of bearings, Mr. Hoffman? Is that the reason for this interchangeability of the inner race ring? A. Yes, sir, that is right.

Q. Normally with respect to a Guiderol bearing what serves as the inner raceway for that bearing when it is installed?

A. The shaft would serve as the inner race if we did not supply them with an inner race of our manufacturer.

The Court: You mean in some cases the shaft is

(Testimony of Virgil A. Hoffman.)

the inner ring and in other cases there is an inner ring on the shaft?

A. That is right.

Q. (By Mr. Mueller): Mr. Hoffman, so we all understand in a representative way a shaft, I am pointing to Fig. 1 of the Heim patent 1885914, and using that figure merely as an illustration, is the element 17 a shaft?

A. Yes, sir, No. 17 is a shaft and it would serve as an inner race in this application.

Q. You are talking about putting an outer race ring [160] assembly such as Defendant's Exhibit J on a shaft—and again I am pointing merely for illustration—to a shaft such as 17 in Fig. 1 of Heim?

A. That is right.

Q. Mr. Hoffman, is an inner ring necessary when the outer bearing assembly is mounted directly on a shaft?

A. No, sir.

Q. If the customer in ordering a Guiderol bearing from you or your company does not specify how and where he is going to install the bearing, do you inquire, Mr. Hoffman?

A. Not normally, no, sir.

Q. Has anyone in your company told you that when you sell a Guiderol bearing you must inquire as to how that bearing is to be installed by the customer?

A. No, sir.

Q. Might anyone in the employ of your company, such as clerks and the like, sell Guiderol bearings to customers requesting the same?

A. Yes.

(Testimony of Virgil A. Hoffman.)

Q. Have you ever been told by the McGill Manufacturing Company, as the manufacturer of the Guiderol bearing, that you should inquire of the customer as to the place and type of installation which he is going to make before you sell a Guiderol bearing? A. No, sir. [161]

Q. Have you ever been told by anyone that the Guiderol bearing such as Defendant's Exhibit I will work only if the outer race ring carrying a guide rail is mounted in a stationary position?

A. No, sir.

Q. Over the years that you have been selling Guiderol bearings do you recall of any customer who asked you whether the race ring having the Guiderol thereon should be mounted in the application so that the race ring is stationary or rotating?

A. No, sir.

Q. In your sales talk to customers and prospective customers in the sale of Guiderol bearings have you ever mentioned that the guide rail should be on the stationary race of the bearing installation?

A. No, sir.

The Court: What you are saying practically is you are not interested in what the customer does with it. All you are doing is selling these things, is that right? A. That is right, your Honor.

Q. It is like a man selling a piano. He doesn't care whether you place the piano in the kitchen or where you put it. All he is interested in is selling the piano. Is that a correct statement colloquially?

A. That is right, your Honor. [162]

(Testimony of Virgil A. Hoffman.)

Q. You just sell those things. That is your business.

A. We like to know that it works well so we get repeat business. I will say that. Otherwise you are absolutely right on that. [163]

* * * * *

Q. (By Mr. Mueller): Mr. Hoffman, do you know of your own knowledge whether a Guiderol bearing such as Defendant's Exhibit I when the outer race ring carrying the guide rail is mounted in a rotating position in a machine or other application? A. Yes, I do.

Q. Do you know of any installation of Guiderol bearings where the outer race ring having the guide rail on the inner surface of the outer ring is mounted as the rotating member of the bearing?

A. Yes, we sell an installation like that to the Hillman-Kelley Company in Los Angeles.

Q. In the Hillman-Kelley installation to which you refer, the guide rail then is rotating, is that correct, in an operating bearing?

A. That's right, sir.

Q. I hand you a print marked for identification Defendant's Exhibit K. Will you state what it was and I will hand it to you, Mr. Hoffman.

(The blueprint referred to above was thereupon [164] marked Defendant's Exhibit K for identification.)

Q. (By Mr. Mueller): Will you please state what the print is, Mr. Hoffman?

(Testimony of Virgil A. Hoffman.)

A. Oh, I beg your pardon. It is a cluster gear assembly.

Q. Where did you obtain the print which you have in your hand?

A. From the Hillman-Kelley Company.

Q. Have you actually observed a Guiderol bearing installation at the Hillman-Kelley Company in the cluster gear assembly of that print?

A. Yes, sir.

Q. Did you obtain the print marked Defendant's Exhibit K in the ordinary course of your business with Hillman-Kelley Company?

A. Yes, sir.

Q. In the Hillman-Kelley Company installation represented by that print does the Guiderol bearing have an outer race ring assembly?

A. Yes, sir.

Q. Does the race ring in that Guiderol bearing rotate in the installation on the print?

A. Yes, sir.

Q. Has the Hillman-Kelley Company ever reported to you or to your company any failure of a Guiderol bearing or the guide rail that was on the rotating race ring? [165]

A. No, they haven't.

Q. Approximately how many Guiderol bearings of the type illustrated in the print marked for identification Defendant's Exhibit K has the Hillman-Kelley Company purchased?

A. Well, I would say about several thousand.

Q. Over what period of time did the Hillman-

(Testimony of Virgil A. Hoffman.)

Kelley Company purchase the Guiderol bearings you have described? A. Since about 1953.

* * * * *

Q. (By Mr. Mueller): Does the Hillman-Kelley purchase any other type of Guiderol bearing than the one shown on the print which you have before you, Mr. Hoffman?

A. Yes, they purchase another size bearing.

Q. Have you anything to show an installation of the Guiderol bearing to which you have just testified? A. Yes, I had a drawing. [166]

* * * * *

Q. (By Mr. Mueller): Will you please look at that and tell us what the print is?

A. It is a print of an idler gear assembly, and this was also used in their casings tongs, also an outer race rotation and the guide rail is on the outer ring of the bearing.

Q. Does the gear assembly shown on the print which you have in your hand have one race or two race rings? A. Two race rings.

Q. And would you characterize those two race rings as an inner race ring and an outer race ring, Mr. Hoffman? A. That's right, sir.

Q. Is the guide rail in the Guiderol bearing of the installation in the prints which you have moving or stationary?

A. The Guiderol is on the outer race and that rotates as the gear turns. The guide rail is on the rotating member.

Q. Then in this Guiderol bearing of the print

(Testimony of Virgil A. Hoffman.)

Defendant's Exhibit L we have an inner and an outer race ring? A. Yes, sir.

Q. But in this installation the guide rail on the outer race ring rotates; is that correct?

A. That is right. [167]

Q. In that respect, Mr. Hoffman, does the guide rail rotate in this installation the same as it does in the installation of the print which you previously testified to? A. Yes, it does.

Q. Did you obtain the print marked Defendant's Exhibit L for identification in the ordinary course of your business? A. Yes, sir.

* * * * *

Q. (By Mr. Mueller): In your experience from 1952 to date in the sales of Guiderol bearings have you had any reports of failure where the race ring carrying the guide rail was on the rotating race of the installation? A. No, I have not.

Q. During the period from 1952 to date can you make a comparison within your experience between the life of a Guiderol bearing where the guide rail is rotating and the installations where the guide rail is stationary?

A. Well, in my experience the life of the bearings has been the same. We have no failures, and so they have given good service and I would say that—— [168]

* * * * *

Q. (By Mr. Mueller): I hand you a print marked for identification Defendant's Exhibit M.

(Testimony of Virgil A. Hoffman.)

Will you please state what it is, and I will hand it to you in a minute, Mr. Hoffman.

* * * * *

A. This is an application, or this drawing is an R.P.B. Corporation drawing of a wheel on their steel slab breaker and it incorporates two Guiderol bearings identified here as GRI 5212 wheel bearing.

Q. Were Guiderol bearings such as are illustrated in that print purchased from your company?

A. Yes.

Q. Did you obtain this print marked for identification Defendant's Exhibit M in the ordinary course of your business? A. Yes, sir.

Q. In the Guiderol bearing installation of that print does the guide rail rotate or is it stationary?

A. It rotates. It is pressed into the hub of the wheel and [169] as the wheel rotates the outer ring with the guide rail on it turns with the wheel.

Q. Is the Guiderol bearing of the installation in the print to which you have testified sold with one or two race rings?

A. There are two race rings.

Q. And do I understand that the guide rail in the bearing is on the race ring which is rotating?

A. That's right, sir.

Q. That is in the installation represented by the print marked for identification Defendant's Exhibit M? A. That's right.

* * * * *

Q. (By Mr. Mueller): So far as a race ring and a guide rail and a roller portion of a Guiderol

(Testimony of Virgil A. Hoffman.)

bearing is concerned, Mr. Hoffman, is that structure present in the Hillman-Kelley and the R.P.B. installations to which you have testified?

A. Yes.

Q. Can you tell us some of the different types of mechanisms or equipment where you know that a Guiderol bearing such as you have testified to was actually installed? [170]

A. Well, we have sold them for wheels such as this R.P.B. drawing, Crane wheels, sheaves, hoists—pulleys, rather. I think that is the general—

Q. Considering a pulley installation, do you know of your own knowledge that Guiderol bearings were installed in pulley applications?

A. Yes, sir.

Q. Would a pulley in such an installation normally operate on a stationary shaft?

A. Yes, sir.

Q. In a representative pulley installation or a Guiderol bearing would the guide rail be on the rotating or the stationary race?

A. It would be on the rotating race.

Q. Could we say, Mr. Hoffman, that in pulley installations with which you are familiar, Guiderol bearings are always mounted so that the guard rail is on the rotating race? A. Yes, sir.

Q. Have you ever had any complaints from customers to whom you have sold Guiderol bearings where you know that the bearing went into a pulley installation? A. No, sir. [171]

* * * * *

(Testimony of Virgil A. Hoffman.)

Q. (By Mr. Mueller): Will you please tell us what this bearing is that I have handed to you?

A. Is is a nonseparable Guiderol bearing.

Q. And what do you mean by a nonseparable Guiderol bearing such as the bearing marked for identification Defendant's Exhibit N?

A. Well, as we illustrated before with defendant's Exhibits I believe I and J, the inner race would slide out in either direction; there was nothing within the bearing to hold it there. However, in this bearing there is a rail on both the inner and outer races, on the inside of the outer race and on the outside of the inner race, and these rails both project into the recesses of the roller and hold the bearing together in such effect.

Q. Is the rail on the outer race ring in that bearing integral with the race ring on the inside of the raceway, Mr. Hoffman?

A. Yes, it is.

Q. And is the ring on the raceway of the inner ring separable, as we call it?

A. It can be removed, yes, sir; it is not a part of it.

Q. That is what you mean by separable; it is not integral? [172]

A. That's right, sir.

Q. Have you sold Guiderol bearings of the nonseparable type?

A. Yes, I have.

Q. Have you ever had any reports of failures of such bearings, Mr. Hoffman?

A. No, I never have.

Q. To your knowledge do both rings inside the raceway have some guiding function?

(Testimony of Virgil A. Hoffman.)

A. Yes, I would say they do.

Q. In Defendant's Exhibit A, the file wrapper of the patent in suit, in paper No. 4 and on page 4, lines 2 to 4, the following statement appears, and I quote — this is the file wrapper of the patent 2334227 in suit:

“In order to prevent skewing the ring would have to be carried by the stationary race of the bearing.”

End of quote. Based on your observations of Guid-erol bearings which you have sold and are in actual operations, do you agree with that part of the state-ment which I read which states that the ring would have to be carried by the stationary race of the bearing?

A. No, I couldn't agree with that.

Mr. Mueller: That is all. [173]

Cross Examination

Q. (By Mr. White): Mr. Hoffman, when was this Bearing Specialty Company formed?

A. Well, I am not exactly sure of that. How-ever, in September of '55 we started to operate under the name Bearing Specialty Company in Los Angeles and Maywood.

Q. Is that a separate corporation?

A. I don't know that, sir; it is the succeeding corporation to Casey Bearing.

Q. Is it a corporation? A. Yes, sir.

Q. And did you or did that corporation pur-chase the business in Los Angeles from Casey Bear-ing Company?

(Testimony of Virgil A. Hoffman.)

A. I am not familiar with the corporate structure, sir.

Q. What is your office in that corporation?

A. Well, I am a vice-president or general manager—and general manager of the Southern Division.

Q. Do you have directors' meetings?

A. No, sir.

Q. Never?

A. I meet with the president and secretary-treasurer very often but it isn't—I don't think that is considered a directors' meeting.

Q. Did anybody ever tell you whether that corporation of which you are vice-president purchased the Los Angeles office [174] and business of Casey Bearing Company?

A. Well, we just changed our name from Casey Bearing. Casey Bearing bought out Bearing Specialty Company.

Q. Oh; then what happened here was you changed the name from Casey Bearing Company to Bearing Specialty Company; is that right?

A. That is my interpretation, yes.

Q. Then it is not a new corporation?

A. Well, whether they dissolved the old one and formed a new one, I am not prepared to say.

Q. Are you still a branch of the Casey Bearing Company?

A. Well, we operate all stores as Bearing Specialty Company.

(Testimony of Virgil A. Hoffman.)

Q. Do you report your sales to Casey Bearing Company in San Francisco?

A. They get a copy of our invoices; we don't report in the sense that we make out a report of sales.

Q. But you send copies of your invoices to Casey Bearing Company in San Francisco; is that right?

A. Yes, sir.

Q. Does your company or do you deal with a corporation named McCulloch Motors Corporation?

A. Yes, sir.

Q. Do you sell any Guiderol bearings to them?

A. Yes, I have sold Guiderol bearings to them.

Q. About what is the volume of sales to that company? [175]

A. Well, their business is chain saws and it is a seasonable or a seasonal and competitive business. Taken on a yearly basis I wouldn't know just what to say; maybe a thousand, maybe two thousand.

Q. A year? A. A month.

Q. A month? A. Yes.

Q. Are you selling them the kind of Guiderol bearings where the outer race rotates or where the shaft of the inner race rotates?

A. The shaft rotates in that application.

Q. You mentioned in your testimony the Hillman-Kelley Company and the R.P.B. Corporation. Is there any other account you could name to whom you are selling Guiderol bearings where the outer race rotates in the application?

(Testimony of Virgil A. Hoffman.)

A. Yes, we have sold them to the Crane Veyor Company.

Q. Anybody else?

A. We have sold them to Downs Crane and Hoist.

Q. Anybody else?

A. There was one crane outfit that operated under two names. We either sold them as Angelus Engineering or National Standard Crane Components; it would have been to one or the other.

Q. Would it be correct to say that the majority of the sales [176] of your bearings are the kind where the outer ring rotates?

A. Not in the majority of applications, no.

Q. Which would be the majority of applications, where the inner race rotates or where the outer race rotates?

A. Well, I would say that is hard to say, because many cases we don't know where the bearing is being used; but in our large volume accounts, I would say McCulloch Motors is inner race rotation, Hillman-Kelley—well, I just couldn't—I would say that possibly we have as many of each in our regular accounts.

Q. Could you tell me approximately your gross volume of Guiderol Bearing sales for the year of 1955?

A. Dollar volume?

Q. No, number of Guiderols.

A. No, I'm afraid I couldn't without checking the records. [177]

Q. What proportion of the gross business in

(Testimony of Virgil A. Hoffman.)

guide rail bearings approximately would be those accounts that you just mentioned, including R.P.B. Corporation, Hillman-Kelley and a few others you mentioned to the total Guiderol business you handle? A. Are you including McCulloch in that?

Q. Yes.

A. I would say that is probably 90 per cent of our Guiderol business.

Q. You mean 90 per cent of your business would be R.P.B. and Hillman-Kelley—is that 90 per cent of your Guiderol business?

Including McCulloch Motors in that question I was asking you—is McCulloch Motors using bearings where the outside race rotates?

A. No, sir.

Q. I was trying to establish the proportion of the business where the outside race rotates to the gross business of Guiderol bearings themselves of all kinds.

A. Well, I would almost have to study that, but our biggest account is McCulloch Motors Corporation, and that is inner race rotation. I would say probably 50 per cent of our sales would be represented by outer race rotation. I mean 50 less, say, than one-third of our total sales would be outer race and two-thirds would be inner race rotation, but [178] that of course is one application.

Q. In these cases are you selling in each case a roller bearing without an inner race and then the inner race is sold separately?

A. No, sir. Hillman-Kelley buys in one case the

(Testimony of Virgil A. Hoffman.)

bearing complete with an inner race. However, McCulloch does not use an inner race, and the cluster gear assembly, Defendant's Exhibit K, does not use an inner race.

Q. If as you said at least one-third of your Guiderol business is in this outer race rotation guide rails like Hillman-Kelley, you say you handle those outer race rotations with the inner race together, if I correctly understood.

A. That is one. I would say in that case where they do have an inner race, that is probably 20 per cent of Hillman-Kelley's purchases. They buy many more for the application that does not have an inner race. However, they are all outer race rotation.

Q. Would that be more than 50 assembled units?

A. Yes, I would say so.

Q. Do you wish to correct your testimony which you stated that within the last five years you sold only about 50 assembled units with inner rings and outer rings assembled together?

A. Mr. Mueller asked me if we sold them in our store. We do not sell those in our store. We just solicit the business [179] and those are shipped by McGill. We do not sell them ourselves. I mean we do not deliver them. We do not buy them and sell them.

Q. You take orders for them and send the orders to McGill? A. That is right.

Q. It would be more than 50 assembled units in five years that were sold through your efforts with the inner rings and outer rings assembled?

(Testimony of Virgil A. Hoffman.)

A. Yes, there would be more than that.

Q. Substantially more?

A. Well, I don't know exactly how many. I would say there probably would be 500 of that particular assembly.

Q. You knew you would be called to testify to-day, didn't you?

A. Well, I didn't know whether McGill's sales were going to be considered our sales or not. I mean, I didn't think they were.

Q. Do you use the same catalogues in your business, your soliciting business, as Casey Bearing Company in Guiderol bearings? A. Yes, sir.

Q. Are you acquainted with the catalogue, "McGill Precision Bearings", Plaintiff's Exhibit 17, which I will show you here? A. Yes, sir.

Q. Do you use that in your sales efforts? [180]

A. Yes, sir.

Q. Will you take that catalogue, please, that you have in your hand, and refer to the information there beginning at page 9 of that catalogue, which is from then on engineering information as to the users of these various bearings, is that right?

A. Yes, sir.

Q. There are various formulas shown for the various applications of the bearings, is that correct?

A. Yes.

Q. That continues on in those pages. Could you point out in the applications there about how many examples there are in which the outer races revolve and how many where the outer races are stationary?

(Testimony of Virgil A. Hoffman.)

A. Do you want to consider ball bearings, too?

Q. In general, yes.

A. On page 9 you have inner race rotation, I would say.

Q. There are two applications with inner race rotation?

A. Well, no, I would have to take that back. That could be a spindle, in which case it would be inner race rotation or it could be mounted in—well, it could be mounted in a wheel or anything.

Q. Did you read the legend which says, "In the straddle mounting the reaction on both bearings is opposite to the direction of RL." Isn't RL the rotating part meaning radial [181] load?

A. The radial load is, straddle mounting means; I would assume that the load is carried between two bearings rather than overhung as it would be in the right hand figure where the load would be applied outside the bearings.

Q. The load arrangement is different in both of them, but in each of them isn't it true the shaft would be rotating?

A. Yes, it would indicate that by indicating the load as applied on the shaft.

Q. Go to page 10. A. That is page 10.

Q. Would you be surprised if I told you, or could you corroborate it, that there are 47 examples in that catalogue of stationary outer races and three examples of revolving outer races?

A. I would not be surprised, sir, if you think of an automobile. I can only think of one case of

(Testimony of Virgil A. Hoffman.)

outer race rotation while all the others are inner race rotation. The front wheels are outer race; everything else is inner race.

Q. Would you consider that approximately the correct proportion of the applications so far as this type of bearings are concerned as between rotating inner races and outer races?

A. I will say that this type of bearing is used mostly in installations where your load is heavy and your speeds are [182] slow, and there are other means taken or other means provided to take the thrust load in the bearing. Now these bearings of the roller type as illustrated in the McGill catalogue will take thrust. So they are very limited in the general broad sense of bearing applications.

Q. Don't you realize the same bearing in Section 3 is devoted to Guiderol bearings?

A. Do I realize what?

Q. That in that catalogue Section 3 is devoted to Guiderol bearings?

A. Well, you mean from page 75 on?

Q. From page 73 on.

A. You have a different book than I do.

Q. Apparently. There is a section on Guiderol bearings giving dimensions, is that right?

A. Yes, sir.

Q. And the various series give examples.

A. All right. On page 77 in my catalogue there are four various mountings, what they describe as typical mountings, and in the first figure I would say that that is all inner race rotation. In the sec-

(Testimony of Virgil A. Hoffman.)

ond figure that is outer race rotation. The third figure multiple, what they call traveling blocks, I believe, and those are outer ring rotation, and then the oil pumping saddle mounting would be an inner race rotation. [183]

Q. Do you know the approximate proportion of that business where Guiderol bearings are used in pumping units? A. I do not sell any.

Q. On the Pacific Coast?

A. I don't know. I don't sell any in Los Angeles.

Q. As to Exhibit K, this drawing of cluster gear assembly, Hillman-Kelley Company, you stated that you observed the operation of this gear assembly. Where did you observe it?

A. At Hillman-Kelley Company. [184]

Q. Do they use these units or did they manufacture them for sale?

A. They make the casing tong, that is, the complete unit, and this is a part of it, and they sell the casing tongs.

Q. Did I understand you correctly? You stated that this was purchased from you over a period since about 1953?

A. We have been selling Hillman-Kelly Company since about 1953.

Q. About what month?

A. Well, I couldn't say that. I would imagine about the middle of the year.

Q. You stated you received this particular print,

(Testimony of Virgil A. Hoffman.)

Exhibit K, in the ordinary course of business. When was it that you received it?

A. I would say about a month ago.

Q. What was the ordinary course of business for which they gave you this blueprint?

A. I asked them for it. I asked our salesman to get it for me.

Q. Did you ask for it in preparation for this trial? A. Yes, sir, I had that in mind.

Q. This drawing is dated March 13th, 1956.

A. Yes, sir.

Q. So this drawing was especially prepared for the purpose of this trial? [185]

A. No, that is not the purpose. That was not prepared for that. The drawing is prepared for parts. Is that the one with the inner race in it?

Q. I don't know what it is. This is the one you testified to that it was an outer race.

A. No. I would say that drawing is made up for giving to people who buy the tong, so they can order parts for that unit.

Q. How is it they made this up on March 13, 1956 just a few weeks before this trial?

A. That is a coincidence, I would say.

Q. In the ordinary course of business, that would be received and made for you just when you order it?

A. As I say, this a parts list, the drawing says. They did not make it for me, sir.

Q. It is just a coincidence it is given to you.

(Testimony of Virgil A. Hoffman.)

It is stated as being made on or about the day you asked that they deliver it to you, is that right?

A. I don't remember what day I went in there, but I feel confident they did not make that up for me. I don't know the people that well.

Q. You have another Hillman-Kelley drawing here which is not a part of the parts list, and that is Exhibit L. Did that come to you in the same way?

A. We got both drawings at the same time, yes.

Q. You say you called them up about a month ago.

A. I went over there a month ago. I didn't call them up.

Q. By coincidence this is also dated March 13th, 1956?

A. It is possible.

Q. So when you refer to the ordinary course of business in receiving this, that meant you went over and asked them to give you a print for the purpose of this trial, is that right?

A. I went over there and I asked them for a print. I do not say they made it up at the time I went there.

Q. Did you ever ask them for a print before?

A. Yes, sir.

Q. When?

A. When they first developed this application.

Q. When?

A. I would say that was about 1953.

Q. Where are those drawings?

A. We sent them back to McGill.

(Testimony of Virgil A. Hoffman.)

Q. You did not keep any copies?

A. No, sir.

Q. Since then have you ever had occasion to ask them again for a print?

A. Since I asked for these?

Q. No, since 1953. A. No.

Q. Wouldn't it have been easier for you to write to McGill [187] to send you out the 1953 print?

A. They have changed their design slightly.

Q. In which respect did they change their designs?

A. They now have a $\frac{7}{8}$ inch shaft where they previously had a three-quarter inch shaft.

Q. The size of the shaft, is that enough difference in illustration of operation of those bearings to justify making blueprints for you?

A. As it says here, these are parts lists and if they had a three-quarter inch bearing, it would not fit on the $\frac{7}{8}$ inch shaft. So the shaft would not be the same, and nothing would be the same.

Q. When was the change made?

A. I do not know that.

Q. How do you know that there was a change made?

A. We stopped selling them GR12 and we started selling them a combination of two GR14 and one GR14M.

Q. When did this change take place?

A. I would have to check our files on that.

Q. Can you approximately remember whether

(Testimony of Virgil A. Hoffman.)

it was a month ago, two months ago, five months ago?

A. Oh, no, I would say it was at least a year ago.

Q. Wouldn't it be reasonable if it was a year ago that they prepared the parts list a year ago instead of March 16, 1956? [188]

A. I do not know when they prepare their parts lists, or I do not know that this is a reproduction of a former drawing.

Q. But that drawing is dated March 16th, 1956.

A. March 13th, 1956.

Q. And that coincides approximately with the date when you requested it?

A. I was over there in mid-March, some time in mid-March, yes, sir.

Q. You were asked whether you could make a comparison between the life of a bearing in which the inner race rotates as compared with the life of a bearing where the outer race rotates. What is the life of a bearing where the inner race rotates?

A. That depends on a number of factors. It depends on what the man wants from the bearing.

Q. When you made the comparison, what factors did you consider?

A. Satisfactory service for the application.

Q. When you answered this question of counsel about the comparison, just what factors did you have in mind?

A. Well, only that the customer is buying a bearing for a specified job, and that apparently it is

(Testimony of Virgil A. Hoffman.)

satisfactory in performing, giving him the life he expects from that bearing.

Q. Then you did not make a comparison, did you?

A. Well, you would have to qualify any comparison. [189]

Q. You were asked as to comparison as to the life of bearings. What is the life of a bearing?

A. According to this catalogue, I believe the average life would be 2500 hours.

Q. Did you have in the report from any company as to how many hours they operated any of those bearings without the bearing breaking down?

A. Since we sold the bearings, since we originally sold this type of bearings, we have had very few complaints.

Q. Which was the few complaints?

A. We had quite a bit of trouble with McCulloch Motors.

Q. For what reason?

A. Well, when we first sold them the bearing, I think we originally had too sharp a corner or something that would scratch shafts. In other cases, they had the retaining rings breaking on them.

Q. Those are the only complaints you heard?

A. That is about all.

Q. Referring to Exhibit N, do you have that before you? That is that so-called non-separable bearing.

A. Yes, sir.

Q. To whom are you selling that?

(Testimony of Virgil A. Hoffman.)

A. To Douglas Aircraft Company.

Q. Did you sell them in production?

A. Yes. I did not consider it production myself, but the [190] factory interpreted it that way and sold them direct.

Q. In what volume?

A. Well, there were, I would say, three or four sizes and they would place an order for, say, 25 a month, 50 a month or 100 a month. You see what they did, they used them in the pump and they do not manufacture the pump, but they use this pump in conjunction with the super-chargers in all the DC series airplanes, and they built the balance of the equipment from the pump on out.

Q. Is that experimental installation?

A. Oh, no, sir.

Q. Why is it the bearing is marked by hand scratching instead of the usual marking of bearings?

A. I imagine this is a sample bearing.

Q. That is not the bearing you are selling, is it?

A. That is similar. That is the construction of the bearing.

Q. You observe that that is marked by hand scratching, the type and all the legends.

A. That is right. That is electric pencil.

Q. Do you mark all new bearing individually by electric pencils? A. No.

Q. How do you mark your production bearings?

A. They are stamped, I presume. [191]

Q. The Exhibit N is not one of those which is stamped, is it? A. No, sir.

(Testimony of Virgil A. Hoffman.)

Q. Is it true that that bearing was made for purposes of this trial?

A. Well, I couldn't tell you that.

Q. Did you produce a bearing from the Douglas Aircraft? A. Yes, sir. May I ask a question?

Q. No, you just answer the questions.

A. Yes, sir, I brought some with me but I do not know if I have them here with me or not.

Q. The same kind of bearings?

A. The same construction, yes, sir.

Q. Exactly the same?

A. Well, not exactly the same. I have one of the same idea, the same O.D., but it is a narrower width, and it is a non-separable bearing just the same as this.

Q. How many hours did those bearings work now?

A. The bearings that I brought with me?

Q. No, the bearings that were installed in Douglas.

A. Those were installed in Douglas. They have a guarantee on their super-charger when they send it out. If they sold a plane, say, to Western Airlines or United or if they replace a supercharging unit in it, they guarantee it for a specified number of hours, and at the end of that time it is up to the customer whether he wants to bring it in for overhaul or take [192] a chance and use it, but I believe most of them bring it in at the end of that guarantee period and have them overhauled again.

(Testimony of Virgil A. Hoffman.)

Q. How many hours is that?

A. I believe in some it runs up to 2500 hours. Some may be as low as 1,000 hours.

Q. When is the first time that this bearing, Exhibit N, was sold to Douglas?

A. The first time I sold them to Douglas was in 1953.

Q. But when in 1953?

A. I couldn't answer exactly.

Q. Will you look in your catalogue there? I believe I took your catalogue. A. I have it.

And see whether or not the bearing is in that catalogue. A. It is not a catalogue size, sir.

Q. It is not offered to the public for sale?

A. I do not think it is, sir. I will look. No, sir, it is not a catalogue item.

Mr. White: That is all the cross examination.

Redirect Examination

Q. (By Mr. Mueller): Mr. Hoffman, on the Guiderol bearing of the non-separable type, Defendant's Exhibit N, is that bearing cut away so that the roll on the outer race ring and the ring on the inner race is visible? [193] A. Yes, sir.

Q. To that extent, of course, Mr. Hoffman, that is not a production bearing in that form.

A. No, sir.

Mr. Mueller: Would it be possible, your Honor, to show that to the jury, the cut-away so they could see the construction? I thought it might help.

(Testimony of Virgil A. Hoffman.)

The Court: You may show it to them if you wish.

(Defendant's Exhibit N was thereupon displayed to the jury by Mr. Mueller.)

Mr. White: We might say at this time, we can't make a motion to strike exactly because we do not know the purpose of introducing this particular bearing in evidence, but in order not to waste any undue testimony on it, we do not claim that this particular bearing, Exhibit N, is within the scope of the claims of the patent in suit or that it would infringe.

The Court: Counsel, you are not talking to the jurors, are you? Just show it to them, counsel. They can pass it around.

Mr. Mueller: They can pass it around, can't they, your Honor?

The Court: I understand your opponent says he is not claiming that Exhibit N is an infringement of the patent in suit.

Mr. Mueller: I see. Then from an infringement standpoint [194] he is not claiming that as an infringement.

Mr. White: That is correct. We do not claim that Exhibit N infringes. It has two rails and all the claims for this patent are on a single rail.

Mr. Mueller: I might say, your Honor, that that is illustrative of a guide rail bearing as sold under that trademark with two rails, and in the prior art there will be prior patents with the rail on the inside and the outside.

(Testimony of Virgil A. Hoffman.)

The Court: If it is not claimed as an infringement, it is academic here. It is waste of time to show it. [195]

* * * * *

(Whereupon brown book was received in evidence and marked Defendant's Exhibit O.)

[See Book of Exhibits.]

* * * * *

The Clerk: Defendant's Exhibit P introduced and filed in to evidence.

[See Book of Exhibits.]

* * * * *

M. F. SPOTTS

called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name to the Court and to the jury.

A. M. F. Spotts.

The Clerk: Please spell your last name.

A. S-p-o-t-t-s.

Direct Examination

Q. (By Mr. Mueller): Dr. Spotts, will you please state your age and your place of residence.

A. My age is 60. My residence is No. 320 Woodland Avenue, Highland Park, Illinois.

Q. And what is your present occupation?

A. I am a teacher at Northwestern University, Evanston, Illinois.

Q. How long have you been teaching at Northwestern University?

(Testimony of M. F. Spotts.)

A. I came to Northwestern in the fall of 1941.

Q. Over the period since 1941 what subjects have you taught at Northwestern University, Dr. Spotts?

A. I teach mechanical engineering subjects, those concerned mainly with mechanical design of machinery and equipment.

Q. Is all of your teaching in the graduate school of Northwestern University at the present time?

A. No; approximately half is undergraduate and half would [197] be graduate subjects.

Q. And is all of your teaching on mechanical engineering subjects? A. It is.

Q. Before going to Northwestern University in 1941, did you have other teaching experience?

A. Yes, for three years previous to that I was at Johns Hopkins University at Baltimore, Maryland.

Q. What subjects did you teach at Johns Hopkins University?

A. I taught the same subjects as I am now teaching at Northwestern.

Q. Will you please tell us the colleges you attended prior to your teaching experience at Johns Hopkins and Northwestern Universities?

A. In 1923 I graduated in mechanical engineering at Ohio Northern University. In 1933 I got a Master of Arts degree in mathematics at Ohio State University and in 1938 I got a Doctor's degree in applied mechanics at the University of Michigan.

(Testimony of M. F. Spotts.)

Q. Have you published any books in the field of mechanical engineering?

A. Yes, I have published one book. It is a textbook on machine design. The title is Design of Machine Elements.

Q. When was your book originally published, Dr. Spotts? A. It was first published in 1948.

Q. Has it been republished?

A. Yes, I revised it once and it was republished in 1953.

Q. What can you say as to the general recognition of your textbook in the field of mechanical engineering?

A. The publishers claim that it is the most widely used text printed in America in engineering colleges for instruction in this subject. It is also published in England, mainly for the export trade. I have had correspondence from people in various foreign countries, so I am led to believe that it is pretty widely distributed.

Q. I have a copy of your book in my hand, and Chapter 9 I notice is entitled, "Ball and Roller Bearings." Where did you get the material from which you wrote the Chapter 9 on ball and roller bearings?

A. The source material for this chapter came mainly from catalogues and other printed literature of the leading makers of ball and roller bearings. Such literature is perhaps the best source of information on this subject.

Q. In your teaching experience at Johns Hop-

(Testimony of M. F. Spotts.)

kins and Northwestern Universities, have you considered the theory of anti-friction bearing operation?

A. Yes, I have considered it at some length.

Q. In your academic experience have you had anything to do with the roller type of anti-friction bearing?

A. Yes, I have had to consider that, too. [199]

Q. And when we talk about anti-friction bearings, is that the broad term for all bearings that have rolls or needles or balls, Dr. Spotts?

A. Yes, that is the generally used term.

Q. What, if any, experience have you had in the field of mechanical engineering in addition to your teaching experience to which you have testified?

A. On graduation in 1923 I went—I enrolled in the Engineers' Training program of the Packard Motor Company in Detroit, Michigan. Later I spent five years with the Brown Steel Company at Columbus, Ohio. After that I spent two years with the Jeffrey Manufacturing Company, Columbus, Ohio. Here my work was concerned mainly with the design of conveying—material-handling equipment—conveyors, elevators and machinery of such type. Among other things I designed some machines that were used on the excavation at the Grand Coulee Dam. These were the largest machines of the type that had ever been built up to this time. I am also a consultant to a number of industrial firms in Chicago and vicinity, and have kept up

(Testimony of M. F. Spotts.)

with the practice of engineering outside of the school.

Q. Referring to the bearings sold by defendants under the trademark Guiderol as represented by the assembly that is in evidence, Defendant's Exhibit J, are you familiar with that structure? [200]

A. I am.

Q. Dr. Spotts, have you observed Guiderol bearings of the type that you just referred to in actual installations?

A. I have.

Q. Have you tested any of the Guiderol bearings under simulated operating conditions on a test board?

A. Yes, I have made such tests.

Q. Have you studied Plaintiff's patent 2334227 in suit?

A. Yes, I have studied his patent.

Q. And can you find any statement in the Stallman patent wherein he gives the general object for his alleged invention?

A. Yes.

Q. Will you please read the same?

A. On page 1, column 2, beginning at line 6, I quote:

"A further object of the invention is the provision of a needle type bearing in which the thrust action set up by misalignment of the needles is minimized and is self-correcting through the roll action of the bearing."

End of the quotation.

Q. Dr. Spotts, will you just go a little slower when you identify it so that His Honor may follow, if he wishes, identifying it and then reading it.

(Testimony of M. F. Spotts.)

The Court: It is more important for the jury to follow [201] the document.

Q. (By Mr. Mueller): Will you read slowly then—Will you point out, identify it and then read slowly? I just wanted to identify it, sir.

The Court: He has already read that provision. What is the question now?

Q. (By Mr. Mueller): Does the plaintiff in his patent describe how the objective of his patent is accomplished, and as you do so, will you please refer to the chart of the patent 2,334,227 so that the jury may follow the items that you refer to?

A. This would be on page 2 in the second column beginning at line 30, and I quote:—

Q. Do you have a pointer there, Doctor?

A. There is one right here.

To quote:

“Referring now to Fig. 7 wherein three needle rolls constructed in accordance with the present invention, are diagrammatically illustrated, the central needle roll has assumed the same misaligned position and has come into frictional engagement with the ring 15 at the point a. The needle rolls are in this case also rolling in the direction of the arrow b, but the force which tends toward misalignment takes place only between the point a and the left-hand end of the needle. [202]

This is less than one-half the length of the needle. On the other hand, the force tending correct this misalignment or advance the re-

(Testimony of M. F. Spotts.)

tarding position of the needle takes place between the point a and the righthand end of the needle which is more than one-half its length. Consequently, the tendency in normal operation of the bearing is for the misaligned needle to assume proper alignment rather than to increase its angularity and transmit the same to all of the needles in the bearing.”

End of quotation.

Q. Considering the two Guide rail bearings of Figure 5 of the patent and the one guide rail bearing——

The Court: Counsel, may I interrupt you?

Mr. Mueller: Yes, sir.

The Court: What is it you had him do there except to read the patent and describe it on the drawing?

Mr. Mueller: I am doing it, sir, to set the stage for the demonstration of prior art and the operation of the prior art devices. [203]

* * * * *

Mr. Mueller: That is in Defendant's Exhibit O, your Honor. You follow me?

Q. I notice on the chart, Dr. Spotts, the word "Haddan." This is the patent, is it not, of Oswald Francis Zahn of Los Angeles, California, and does that appear in the specification of the British patent?

A. Yes, the name Zahn appears in the specification.

Q. And Haddon is referred to in this specifica-

(Testimony of M. F. Spotts.)

tion as the patent agent or solicitor; is that correct?

A. Yes, he is the solicitor for Mr. Zahn.

Q. So that the chart is actually a reproduction from the Zahn patent; is that correct?

A. That is correct.

Q. Referring to the Zahn British patent 17841 and pointing out on the chart, will you tell us in your own words what the British patentee, Mr. Zahn, says about the operation of the bearing of that patent?

A. In his specification Mr. Zahn in British patent 17841 refers to Figure 1 of the diagram by which he explains his operations. He says he has a fixed race which he represents as element (e), and he has a roller (a), and the roller has enlarged portions on either end, and then another race bearing upon the top of the roller would be (c) moving in the direction of the arrow. Mr. Zahn says that if roller (a) becomes skewed and misaligned, as soon as it does so it will roll over, downward in this case, until its enlarged portion (d) comes into contact with edge (e) of the race, and when it hits the edge there, there will be a friction set up which will retard the forward end, and at the same time this other race (c) here is moving and will shove forward the lagging or rearward end until the roller will become straightened out again, and then it will proceed in a direct line as it is supposed to do.

Q. Can you compare the operation as described in the British patent with the operation as described in the Stallman patent in suit?

(Testimony of M. F. Spotts.)

A. Yes. The wording might be different, but the effect is exactly the same.

Q. In so far as both patentees are concerned, in the British patent and in the Stallman patent, what can you say as to the results in the two bearings while they are in operation in so far as skewed or misaligned rollers are concerned?

A. The end result is supposed to be the same in Stallman patent 2,334,227 and Zahn British patent 17841 in so far as both of them describe a method for causing the roller to right itself.

Q. Referring to the British chart, what is the ideal [206] position stated for a load carrying roller, and will you identify it?

A. In British patent 17841 the load-carrying rollers are designated by the letter (a) in Figure 2 and in Figure 4 and in Figure 6, and the ideal position of such a roller would be parallel to the axis of the two races.

Q. And that is the ideal position of a roller in the Stallman patent?

A. Yes, that is the ideal position in the Stallman patent also.

Q. What causes load-carrying rollers such as those in the British and the U. S. patents in suit to become misaligned or skewed, Dr. Spotts?

A. The principal cause of misalignment of the load-carrying rollers would be a misalignment of the two races of the bearing. They are not quite parallel; the two races assume a position at a slight angle with each other, and therefore the load-carry-

(Testimony of M. F. Spotts.)

ing rollers will assume another angular position different with both of the races.

Q. And that is the situation with the bearing in each patent when the roller skews or becomes misaligned? Is that correct, Doctor?

A. Yes, that is correct in these two patents and other roller bearings, too.

The Court: What do you mean by that? What causes it? [207] The pressure?

A. The shaft might deflect. In other words, the shaft might tip down a little bit and would carry the inner race with it, and therefore the inner race would be off at a slight angle. The outer race would be horizontal and the inner race might be just down a little bit.

The Court: And when that happens?

A. Then the roller takes a position of its own slightly different to both of them. [208]

Q. Can you compare in any other way the structures and functions of the bearings of the two patents, that is, so far as anti-friction bearing units are concerned?

A. Both of these patents, Stallman 2334227 and Zahn British patent 7841 are anti-friction devices, bearings. They consist of the same essential parts. There are some mechanical details, but essentially they are the same device.

The Court: What is the structural thing that enters into this English patent that you say would correct the misalignment?

A. He accomplishes what I went through on

(Testimony of M. F. Spotts.)

this diagram. Do you mean what does he do to his bearing to make this happen?

Q. What is there inherent in the nature of the structure which he describes that has the effect of tending to correct misalignment? What does the structure itself do to accomplish that?

A. He provides a reduced portion in the rolls and he provides a rail on the race and arranges the dimensions in such a way that this roll on the race comes in contact with the shoulder in the reduced portion of the roll and holds the head end of the roller back and lets the tail end catch up.

Q. What does Mr. Stallman do?

A. Mr. Stallman does the same thing.

Q. Mr. Mueller: That, Dr. Spotts, is the way the two [209] patentees describe their operation?

A. Yes, that is according to the patent, each patent.

Q. Will you please turn to United States Kinster patent 585580, issued on June 29th, 1897, and that, your Honor, is the non-cited collection. We might just take this, Dr. Spotts. We have a reproduction.

* * * * *

Q. (By Mr. Mueller): Referring to the chart which is an enlarged reproduction of the drawings of the patent 585580, will you simply point out those elements in the drawings and identify them as you go through them which affect a roller during the operation of the bearing?

(Testimony of M. F. Spotts.)

A. Should I include the skewing correcting feature?

Q. Yes, will you do that, please? May I say first, Doctor, may I ask first, does a bearing such as that illustrated in the Kinster patent affect skewing or act upon a skewed roller when that skewing occurs?

A. There would be an effect upon the skewed roller.

Q. Will you please point out the structure of Fig. 2? Will you take that, please?

A. In Fig. 2 of Kinster patent 585580 there is an outer race No. 2. This outer race No. 2 has a rail 4 integral with it. Then there is a plurality of load carrying roller 6 which [210] have a reduced portion or groove No. 7 intermediate the two ends.

In Fig. 2 there is an inner race, which is the shaft itself in this case, and it is shown dashed as element No. 8.

Then there is a retaining spring No. 10 which enters the groove in the roller and presses outward for the purpose of holding the rollers in place against the outer race for purposes of transportation.

This Kinster patent also has another element in it, a separating roller No. 9, which is simply a disc of metal shown down here in Figures 7 and 8 and they are placed between the load carrying rollers in the groove, and they serve to keep the main load carrying rollers separate from each other.

Q. Is there a retaining spring that holds the

(Testimony of M. F. Spotts.)

rollers in the assembly, in the outer race ring assembly, if the roller bearing of Fig. 2 is separated from the shaft?

A. Yes, there is. That would be this spring No. 10 in Figure 2 of the Kinster patent. It is shown here again, No. 10 in Figure 1. It is shown in detail down here in the two figures 9 and 10 at the bottom.

Q. In the bearing illustrated in Fig. 2 of the Kinster patent, as there illustrated would the outer race ring rotate?

A. Well, of that you could hardly say. This just shows the [211] bearing, but what the purchaser would do with it I would be unable to say.

Q. With a journal in the center does that indicate that it is rotating or fixed?

A. I do not believe that would tell me anything further. I would not know from that, either.

Q. You are just referring to the drawing as it is shown on the chart?

A. Yes, just to refer to shaft 8 in Figure 2 I couldn't say.

Q. Do you find in that Kinster patent the elements of an outer race ring with the guide rail fitting in recesses in rollers and a retaining ring for holding the rollers in the outer race ring the same as in the Stallman patent?

A. Yes, I find those elements.

Q. In that respect do you find the same elements in the British patent 17841?

A. In the British patent, Zahn 17841, there is

(Testimony of M. F. Spotts.)

no retaining spring such as these other two patents have that we have cited.

Q. If there was misalignment in the races of the bearing of the Kinster patent 585580, would the rollers skew or become misaligned in that bearing?

A. Yes, these rollers would sustain some misalignment in the same way that another bearing would.

Q. Would the guide roller which you pointed out affect the [212] skewed rollers?

A. Yes, it would have some effect upon the skewing and upon the roller.

Q. Is that effect the same as when you have a skewed roller in the Stallman patent?

A. I would say to a large extent it would be the same.

Q. Referring to skewed rollers in each of the three patents on the charts on the board, will those rollers stay skewed in the bearing during operation? And I am referring to the Stallman-Kinster and the British Zahn Patents.

A. My experience with this type of bearing leads me to believe that they would stay skewed.

Q. Would that skewing affect the same in each of those three patents, Stallman, Kinster and the British Zahn patent?

A. Oh, largely. The roller would skew. The bearing would keep going around and do the same thing.

Q. And the roller in your opinion would stay

(Testimony of M. F. Spotts.)

skewed in the bearings in each of those patents during operation of the bearing?

A. My whole experience leads me to say that they would.

Q. (By the Court): Doctor, that is a relative matter, isn't it? Let us say in a bearing there are 25 or 30 rollers inside. If they all got skewed it would not make any difference, would it?

A. Yes. [213]

A. When they all get skewed and the bearing locks up, that is where the trouble comes in.

Q. The practical difficulty of it arises because of the fact that a few of them, or less than a substantial number of them get skewed whereas the others remain parallel, is that not so?

A. No, they all skew about the same all the way around. The trouble would arise if that skewing would be so great as to lock up the bearing.

Q. What do you mean by the skewing becoming so great?

A. Just the angular position would increase enough to cause enough wedging effect in here that the races could not turn.

Q. Even if there was only one roller that went askew?

A. Well, no.

Mr. Mueller: I believe Dr. Spotts misunderstood you, Your Honor.

The Court: I am not asking these questions as a lawyer for either side, but just as a simple, practical individual. I want to find out what this means practically.

(Testimony of M. F. Spotts.)

Mr. Mueller: I believe Dr. Spotts misunderstood you when he answered the first question.

Q. (By the Court): What do you mean when you say the skewing becomes bad enough? When you speak of skewing, you mean a roller that gets out of alignment? It twists or gets [214] to one side, is that right? A. Yes, it would.

Mr. Mueller: Excuse me, Dr. Spotts. I think possibly this will help you. Why don't you make your explanation from this large wooden model, if I may, Your Honor? That I think will help us all.

The Court: I was not interested for a moment in the model. I just wanted to find out what the doctor meant when he said that there was a point when the skewing would cause the—what was the word you used?

The Witness: Locking up.

The Court: —locking up. What kind of skewing are you referring to? How much?

The Witness: These rollers are rather close together. It does not fill it up completely. You can get your fingernail in between.

Q. (By the Court): There is a space?

A. But there isn't very much space. So one roller alone to twist would be quite immaterial. When they twist they all twist all the way around and they are in a kind of spiral then.

Q. What you are referring to then is skewing by all of them? A. By all of them, yes, sir.

Q. That is what these inventors have been trying

(Testimony of M. F. Spotts.)

to solve, [215] is it, some way by which the structure could be made to prevent that?

A. Yes. The patents here, Zahn and Stallman, say that they straighten out again and run straight.

Q. According to their structures?

A. According to their structures and according to their theory of operation.

Q. So the purpose of these structures, as the inventors state them to be, is they got the structure worked out in such a way, if they did get a situation where all these rollers, instead of coming along straight, got that way——

A. Yes.

Q. ——that the nature of the structure would straighten them out?

A. That it is exactly.

Q. That is what is involved?

A. That is exactly it. They would go around like this if they were straight. If they twist, they would go around and twist.

Mr. Mueller: May I help, Your Honor?

A. Dr. Spotts, I do not believe you meant to say, did you, that they lock up? They stayed skewed, but the bearing will continue to operate, will it not, with the rollers in a skewed position, even all of the rollers?

A. Oh, yes, they all stay skewed and the bearing operates. The locking up would be such a bearing where the skewing might [216] get so bad——

Q. That would be an extreme situation?

A. An extreme case where failure would be imminent.

Q. (By the Court): Then I understand you to

(Testimony of M. F. Spotts.)

say as a mechanical engineer you do not consider that skewing is of any great importance and necessary to be corrected?

A. No, it is not. The bearing operates very well even if it has got some skew.

Mr. Mueller: By that, Your Honor, I assume you mean it is not necessary for the continued operation of a roller bearing such as we have for the roller to return from the skewed position to a straight position, if I understood your question.

Q. In other words, Dr. Spotts, is it possible——

The Court: I think he has answered my question. I understand it now. You can go ahead and ask any further questions you wish.

Mr. White: May I ask at this time, instead of objecting, that counsel be admonished not to argue his case at this moment.

The Court: All right, I will tell the jury, don't pay any attention to the lawyers' arguments. You are going to have enough trouble with this matter without worrying about the lawyers' arguments. So try to do the best you can with the evidence as you hear it. [217]

Mr. Mueller: If your Honor please, you can see it means that words do become twisted up, sir, and I was trying to get them untwisted.

The Court: I was not attempting to take sides in the matter, you ask any questions you want.

Mr. Mueller: Thank you.

Q. In the structures of the three patents, the Stallman patent, the Kinster patent and the Zahn

(Testimony of M. F. Spotts.)

British patent, when there is engagement between a shoulder of the roller recess and the guide rail, is there any force developed which cancels the skewing in the roller?

A. So far as we have been able to find by tests you cannot develop enough force to make the roller straighten back out again.

Q. The guide rails in each of those patents during operation will limit the amount of skewing, is that correct, if there is engagement between the roller races and the guide rail?

A. It certainly is one of the important limiting factors.

Q. And another limiting factor is the confinement of the roller between the two raceways?

A. Yes, sir.

Q. Is that situation the same in the structures of each of the patents so far as skewing of a roller is concerned?

A. That would be so. Each of these three patents, [218] Stallman, Kinster and Zahn, they have inner and outer races. They have guide rails and shoulders on the rollers, and when the roller twists it comes in contact with the two races and with the guide rail and with the rollers on either side of it, and that effect is present in all three of these patents.

Q. Taking a guide rail bearing such as is here in suit, when the roller in that guide rail skews, does the guide rail have the same function as it does in

(Testimony of M. F. Spotts.)

the British patent and in the Kinster patent and in the Stallman patent?

A. The effect should be very nearly the same. There are some variations in proportions and dimensions which may have some effect, but largely I would say the effect is the same.

Q. So that so far as the prior bearings are concerned, represented in Kinster and Zahn, they show a structure which will do the same thing as the guide rail and race ring structure of the defendant's bearing, is that correct?

A. I would say that is largely so.

Q. Dr. Spotts, can you demonstrate for the Court and jury the skewing or misalignment of rollers in a bearing where the rollers are confined between two raceways and there is a guide rail on one of the raceways?

A. Yes, we have such apparatus here in the courtroom.

Q. Before demonstrating the action of the rollers under a simulated operating condition, would you like to explain the skewed condition again that will appear in the test equipment, [219] using the wooden model so that it will be clearer to those observing the tests? Just show a skewered roller and guide rail if you can.

A. We have here made out of wood a model which simulates the bearing of the Stallman patent. We scaled the drawing very carefully and then enlarged it 15 times and made this out of wood. This would be the roller with a single reduced portion,

(Testimony of M. F. Spotts.)

and we have another roller with two reduced portions. This large curved surface would represent a section cut out of the outer race. The outer race goes all the way around, but we will just cut a piece of it out.

This rail here is the guide rail that you heard mentioned so much in the center. We have it arranged so that we can take this guide rail off the model and put one on either side so the roller with two grooves in it could be used.

This part here represents the inner race, a section out of the inner race to the same scale as the outer race has been made.

So when the bearing is assembled we would have the outer race and the guide rail. We would have the roller with the groove, and then we would have the inner race that would stay on the assembly like this. There would be rollers closely placed all the way around through the opening between the two races. A roller that skews assumes a position——

Mr. Mueller: Excuse me, Dr. Spotts. Mr. Clerk, I have let it go——

The Court: Mark it later.

Mr. Mueller: That is what I would like to do if I may, sir.

The Court: Oh, surely.

The Witness: When the roller is square or parallel with the shaft, of course, it goes back and forth quite freely, but the skewing means it takes a position at a little angle to the axis of the race and, of course, it is being carried on around by the other

(Testimony of M. F. Spotts.)

race that is moving. And so it starts going, and it does not roll but a little bit. It starts to move toward one end, and the shoulder on the groove comes in contact with this guide rail here. That stops the motion all right from the endwise motion. Otherwise the endwise effect would keep on going and pretty soon it would be clear out of the race. It can't do that because the shoulder is stopped by the presence of the guide rail.

Then here is what happens. A roller becomes skewed, races become misaligned. They are not parallel with each other. The roller then takes a cupped-around position. The roller moves, the shoulder and the guide rail come in contact, and it just keeps on going then in that skewed position, rotating on the edge of the guide rail here.

The Court: Doctor, tell me, if as you say all the [221] rollers were moving in this skewed or not parallel position and do not cause any particular harm, why as practical engineers do some of these people seem to be interested in correcting that?

A. A small amount does not do any harm. If it is more skewing and harm would be done, of course, it would be quite nice to have it corrected. But the correction, the so-called correction devices, do not seem to operate.

Q. I was not thinking about whether they operate or not but is there not a legitimate and good reason why the engineers, the people that are engaged in buying, manufacturing and selling this type of ball bearing—isn't there a legitimate reason

(Testimony of M. F. Spotts.)

for their interest perhaps in correcting this skewing condition? If it does not cause any harm I should think they would not be concerned about it, then.

A. That is a point right there that a person could speculate on at great length, the great amount of effort that has been spent on this question, when they operate when they are skewed anyway. [222]

The Court: I can't imagine that there would be so many American businessmen that would be so silly as to spend a lot of time on it if there wasn't some reasonably good purpose to be accomplished.

A. They seem to work very well with a reasonable amount of skew. A little rubbing in there doesn't seem to hurt anything and they just merrily go on their way.

Mr. Mueller: We can demonstrate that, your Honor, if we may. Would you like to do that tonight?

The Court: No.

Mr. Mueller: We have the test equipment set up.

The Court: You put on anything you wish.

Mr. Mueller: Thank you.

The Court: You don't have to ask my permission. [223]

* * * * *

Mr. Mueller: Dr. Spotts, would you please get the test equipment in condition and——

The Witness: I beg your pardon. May I explain it first?

Q. Yes. Will you please explain what you have

(Testimony of M. F. Spotts.)

there for demonstrating the operation of a roller bearing which has a structure with a guide rail on the inner race ring?

A. We have here a test board made with an electric motor for driving two V-belts and two pulleys. The electric motor is a variable speed motor and you can change the speed by means of these resistors.

In these pulleys we have Guiderol bearings. We have one Guiderol bearing fixed up with the Guiderol on the outer race so that it is rotated. That would be the one over here. I beg your pardon. The one with the Guiderol on the outer race will be this one.

Q. That is the right one looking from the back?

A. Yes; the left one from the people on this side. On the right we have a Guiderol pulley with the Guiderol on the shaft so that it will be a fixed Guiderol.

You know it is awful hard to see inside of a roller bearing when it is moving and all these little parts are in [224] there. There has been a problem of great difficulty. We have tried to investigate it in the following fashion. We have cut away a portion of the outer race, just a small portion, and have left the remainder of the race—that is, cut away a portion on one side. At least one half of the race is full all the way around and there has been a little notch taken out of one side. We have done that on both bearings.

(Testimony of M. F. Spotts.)

Then we can start the motor and cause these bearings to buzz around. Now of course they are going around and that notch where you look in at the rollers doesn't do you very much good while it is moving. So we have a light here that we can flash on it, and this is an instrument made by the General Radio Corporation and it is called a Strobotack. It is much used in industrial research. It looks like a headlight and so it is, but a headlight with a special kind of a light. It flickers and the rate of the flashes can be varied. You can make the flashes come very fast or you can make them come very slow. So that in this setup right here we work as follows: when the bearings are going around we adjust the speed of the flashes by means of a knob on the side here and we adjust it so that each time the opening in the race comes before it we throw a beam of light on it, and with the room somewhat darkened, it looks as though that opening was standing still, even though it is going around rapidly when you [225] just illumine it when that opening comes before you each time it looks like it is standing still and we can see the position of the rollers. We will do that now and everyone can see it.

We showed on the larger roller here about what you will see. Remember, these rollers are rather small, and what you can expect to see would be the roller that is twisted over a small amount to one side, and as you look at it if you would try to sight with your eye the direction of the roller as compared with the direction of the shaft so that you

(Testimony of M. F. Spotts.)

can see that the roller really is twisted around some small amount.

Q. Dr. Spotts, in the test equipment have you caused misalignment between the inner and outer race ring or raceway of each of the two pulley installations so as to bring about skewing in the rollers?

A. Yes, we have done that. The standards here which support the pulleys are made adjustable and you can shift them back and forth so that the load from the belt doesn't come directly on the pulley but pulls off a little to one side. That tends to twist the outer race around a little bit and produces this skewing effect.

Q. That is similar to misalignment in a normal roller bearing installation where you have misalignment between the two raceways; is that correct?

A. Yes, that is so.

Q. Will that condition simulate what you have discussed with [226] respect to the two prior patents, Kempster and Zahn British, insofar as the action of the guide rail on a skewed roller is concerned?

A. Yes, these rollers are rubbing against the guide rail, and if the guide rail has any effect I am sure that we can see it here.

Mr. Mueller: Your Honor, would you like to see it, and then would it be possible for the jury to see it? You can only see the little, small aperture. How would you suggest we handle it?

The Court: Well, I don't know.

(Testimony of M. F. Spotts.)

Mr. Mueller: So that it could be observed?

The Court: The jurors can't see it where they are seated in the box.

Mr. Mueller: No, they can't, your Honor. You see it isn't possible to broaden out the light; it comes in a very confined space.

The Court: You would have to get right in front of it, wouldn't you?

Mr. Mueller: Yes, you would have to get right in front of it and there is no way that we could——

The Court: If all of the jurors congregated down in one end of the box, could they see it?

Mr. Mueller: No. Well,—yes, if we could put it right in front of them, your Honor, yes, we could.

Why don't you look at it and then you see how you can suggest.

Dr. Spotts, will you show it to the Court?

Q. (By the Court): Where would they have to look?

A. They would just have to look at the rollers.

Mr. Mueller: Why don't you start it up and show His Honor?

The Witness: You see here's the opening for that one, and the other one is there.

Q. (By the Court): This is the extent of the opening right here?

A. Yes, that is the extent of the opening.

Mr. Mueller: We could demonstrate it very quickly and then you can see exactly the problem, Your Honor. Would it be possible to dim the lights?

The Court: Yes.

(Testimony of M. F. Spotts.)

Mr. Mueller: It will go very quickly as soon as we get under way.

The Witness: The speed varies enough so that you have to keep one hand on the adjusting screw all the time and that takes some little doing. Now you can see the light flashing. You can make it go slow, you can make it go slow, and you can make it go faster.

The Court: Are you going to look at them both at the same time? [228]

A. No, we will just illumine one and then shift the light across to look at the other. Now we will start this going.

Mr. Mueller: Now you started the motor to operating.

The Witness: Then we will try to bring the light into adjustment. Let's look at it over this way. Now if you can sight down from the top of the lamp and with your eye make a comparison with the angle that the roller has with what the direction of the shaft is.

The Court: Like this?

The Witness: No, it apparently can't correct.

Mr. Mueller: Will you talk as loud as you can?

Mr. White: I suggest that you speed it up better than that. You can stop it with a stroboscope, synchronize the speed of your scope.

(The witness demonstrated.)

The Witness: Well, you can see it fairly well there.

The Court: I can see a slight slant.

(Testimony of M. F. Spotts.)

The Witness: You can see a little slant.

The Court: Each juror would have to view it.

Mr. White: I have no objection, but I do know as matter of scientific fact that by a stroboscope that can be brought to an absolute standstill so that the slant can be observed without observing any motion at all, and as a matter of demonstration, a thing moving at that speed, it is pretty hard to judge. [229]

The Court: It is very difficult; you have to watch it for a while.

Mr. White: If the professor would experiment a little bit he can synchronize it so that he can stop it.

The Witness: That is about as good as we can get this thing.

The Court: I beg your pardon?

The Witness: This instrument is in good condition, too.

The Court: I haven't any objection if you want this to be demonstrated to the jury, but I can see each one would have to come up here and look at it.

Mr. Mueller: Yes, Your Honor. You could see that the rollers stayed skewed; is that correct?

The Witness: That is the best I can do.

The Court: I think we had better defer that until the morning and do it in the morning. Then we will draw lots and we will see who the jurors are who are going to be the most fortunate to see it first, you see. I think that would take a little time for each one to go and look at it and it is getting a little

(Testimony of M. F. Spotts.)

late today. I think we will do that the first thing in the morning. You might get it in shape so that it will work out.

Mr. Mueller: Yes, Your Honor, we will. [230]

* * * * *

Q. (By Mr. Mueller): Dr. Spotts, before beginning the demonstration, will you please tell us about the Stroboscope, Defendant's Exhibit T-1. There is some question as to the operation of that yesterday afternoon. Mr. White raised the question. Can you tell us whether that is a new Stroboscope?

A. It is a new instrument. The makers, General Radio Corporation, have an excellent reputation for producing high-grade and accurate equipment. The instrument is brand new. I took it out of the original packing case myself.

Q. Have you operated previously to yesterday this particular Stroboscope, Defendant's Exhibit T-1, and did you find it operating satisfactorily as a Stroboscope? A. Yes, I did.

Q. Over what period of time, Dr. Spotts, have you actually used a General Radio Corporation Stroboscope such as Defendant's Exhibit T-1 in connection with your teaching work? [235]

A. I would say at least five years.

Q. And again, before beginning the demonstration, would you say that that which could be seen yesterday afternoon when the Stroboscope was on and the model, Defendant's Exhibit T, was operating, was that representative of a true test operation

(Testimony of M. F. Spotts.)

of that board, using the Stroboscope, Defendant's T-1?

A. Yes, I would.

Q. That was representative of a normal operation with a Stroboscope?

A. That is correct.

The Court: You will pardon me, but putting this in plain, everyday, simple language so the jury and the judge can understand it, what the witness is going to do is to show the appearance of these bearings in operation, to demonstrate what this process of skewing looks like; is that it in a nutshell?

Mr. Mueller: That is it.

The Court: Go ahead and show it. I guess the only way we can do this is to have the jurors look at it one at a time.

Mr. Mueller: Yes. We have identified it on the record, but I might just ask him to explain what the bearings themselves are so the jury will understand what they are looking at.

Q. Will you please refer now to the tags? We have marked the two bearing mountings as identified in Defendant's Exhibit [236] T-3 for identification.

A. I might first ask him to explain what the bearings themselves are so the jury will understand what they are looking at.

Q. (By Mr. Mueller): Will you refer now to the tags? We have marked the two bearing mountings as identified in Defendant's Exhibit T-3 for identification.

(Testimony of M. F. Spotts.)

A. The bearing in the plate is a standard Guiderol type of bearing. In Defendant's Exhibit 2 for identification the bearing is made specially. There is no Guiderol bearing in common manufacture with the guide roll on the inner race, so we had to make the race specially for demonstration purposes. The rollers are standard rollers as is used in the other bearing. This is standard, out of stock.

Q. Will you identify what you mean by "this one," please?

A. The T-3. The T-3 bearing is standard out of stock and the rollers in the T-2 standard are the regular rollers as would be used in the one in T-3. we had to make that specially because there aren't any standard parts that we can use for that.

Q. Dr. Spotts, you said standard, but I call your attention to the fact that there is an opening in each of the bearings marked for identification T-3 and T-2.

The Court: He explained that, counsel.

Q. (By Mr. Mueller): That is for the purpose of viewing the [237] roller? A. Yes.

Q. To that extent they are not standard. I just wanted that clear.

A. Yes. I explained.

The Court: Are you ready to show that to the jury now? Suppose we start with the first row.

(Thereupon the jurors in turn left the jury box and approached the device, Defendant's Exhibit T, and viewed the demonstration. Dur-

(Testimony of M. F. Spotts.)

ing the demonstration the following comments were made:)

The Court: You will have to tell him where to look.

The Witness: Notice the angle.

The Court: I think you have to squat a little bit to look at it; isn't that right, Doctor? In order to view it, you have to squat down.

The Witness: Yes, sight over the instrument and try to make a comparison of the position of the roller with the direction of the shaft.

Mr. White: May the record show that the rollers on the left are hardly visible under this Stroboscope examination in the comparison of the two, and I would also like to ask the Court to admonish the witness not to discuss this matter with the jurors while they are looking at it, it being suggestive of what they are supposed to see. Let each juror see what he [238] or she sees.

The Court: All right.

Mr. White: Let the record show the juror stated that looking at the left he can't see anything.

Mr. Mueller: If your Honor please, may I just interrogate Dr. Spotts a moment so there is no question as to what they are looking for?

Q. Dr. Spotts, is it a fact that any position of the rollers in either test unit, T-2 or T-3 for identification, any position of a roller out of parallelism with the shaft represents a skewed roller; is that correct?

A. That is correct.

Q. Unless the rollers are perfectly parallel with

(Testimony of M. F. Spotts.)

the shaft of the bearing about which they are rolling, then those rollers are out of alignment or skewed. A. That is correct.

Q. And that might be a great or a small amount?

A. That is correct.

(The demonstration was thereupon completed.)

Q. Dr. Spotts, will you please take the wooden model, Defendant's Exhibit S, and roller S-1, and very quickly just again show skewing on the roller and what constitutes skewing, whether it is a great or a small degree, very quickly, and please state what you are doing.

A. On the roller, Defendant's Exhibit S-1, and the raceway, [239] Defendant's Exhibit S, we have the roller and a section of the outer race. Skewing is operation of the bearing when the roller is tipped at a small angle with respect to the axis of the race: straight (demonstrating); skewed (demonstrating).

Q. And skewing of the roller, Dr. Spotts, as it is used in this testimony, could be any degree of misalignment between the roller and the axis of the roller such as would be represented in an axis, Defendant's Exhibit S?

A. Yes, there are different degrees of skewing.

The Court: You said yesterday it was not particularly important, this skewing, that that always occurs.

A. To some extent it always does, but the amount might be important with relation to the amount of

(Testimony of M. F. Spotts.)

load you are trying to put on a particular bearing.

Q. Of course, with the track there, there is a limit to the amount of skewing, isn't there?

A. Definitely so.

Q. With the track there, the amount of skewing that would occur with the track, I understood you to say, would not be particularly bothersome.

A. The skewing would be limited by the confinement of the rollers, an individual roller with the surrounding bodies.

Q. Just listen to my question, which is just plain language. You have a track there. [240]

A. Yes.

Q. You have rollers running over it.

A. Yes.

Q. It is not altogether different from a railroad train except there is a flange on both sides of this wheel, if that is a wheel. A. Yes.

Q. The amount of skewing that is going to take place is limited by the presence of that rail there, isn't it? There can only be a certain degree of skewing.

A. Yes, it is limited by the rail.

Q. Is the amount of skewing that is limited by the rail, to the extent that is limited by the rail, of any consequence? That is what I want to know.

A. Yes, it is.

Q. I thought you said it was not. You said it did not amount to anything, that it was not of any great concern, because there was always this amount of skewing that would take place.

(Testimony of M. F. Spotts.)

A. The amount of the skewing is important with relation to the other factors in the operation of the bearing.

Q. You got a roller and it is going on a track. At what point is it that the skewing becomes of any importance, or is there such a point? That is putting it to you in our everyday language. Can you answer that? [241]

A. I can answer it only when we think of the load that that bearing might be carrying.

Q. What you are saying, then, is that depending upon the use to which it is put depends the extent to which these rollers can skew and be of little importance, is that right?

A. That is so. My remark yesterday was referring to this particular test board here, when we said the amount of skewing was not important.

Q. In a device of this kind, with the track, is there any point and any use to which the bearings are put where it does become important that, within the limits fixed and the boundaries fixed by the track, skewing becomes of importance?

A. Yes, I would say there was.

Q. What does that depend upon? That is a practical matter, isn't it?

A. Yes, it depends on how big the load is. If the load is little, you can have more skewing than if you would have a very heavy load on the bearing.

Mr. Mueller: May I just make one remark, your Honor?

Q. Dr. Spotts, the matter of skewing must also

(Testimony of M. F. Spotts.)

be taken into consideration with respect to an outer race and the inner race confining the roller, is that correct, as well as the Guiderol on one race?

A. Most certainly.

The Court: What does that mean? [242]

A. That mean---

Q. That is only the place where the roller is confined?

A. Yes, and the confinement, the degree of confinement, in all respects, the guide roll as well as the other bodies, races and the adjoining rollers, confines the roller to the final position.

Q. It would get off the track if there was not something to confine it? A. Yes.

Q. That is it in simple language?

A. Yes, it is.

Q. All you are saying there that is important is if you did not have the rollers confined within a space, they would go off the track?

A. Yes, sir.

Q. That is all that means?

A. Yes, your Honor.

Q. This is not very much different from a railroad train running on a track, is it?

A. It has some qualities of resemblance.

Q. If you had a railroad train running on a track, and you had on top of the train a cover that covered the railroad train so it would not jump up, you would have a similar arrangement, wouldn't you? A. There are some points of similarity.

Q. It would be practically the same. I know that

(Testimony of M. F. Spotts.)

experts never want to answer you directly, but there is not much difference, for practical purposes, is there? There is nothing extraordinary about the idea of something running on a track and being confined to that area? A. Not at all.

Q. So it does not get off the track?

A. Yes.

Q. And that is all this is?

A. That is exactly what it is.

Q. Apparently, though, from your testimony there have been men working on this, according to what you say, since back in 1906 when the Englishman had been working on it, so it must have been a problem right along. A. It worried them.

Q. It must have been a problem.

A. Yes, it was a problem.

Q. Because you yourself have said that this patent that the Englishman made has practically the same means and devices of the Stallman patent.

A. Yes.

Q. So going back that far they were working on it? A. Yes, your Honor. [244]

The Court: I hope I haven't confused you gentlemen too much, and I don't mean to be critical, but it doesn't do any good for patent lawyers to try a case before a jury for the sake of the record. The jury has to understand it in some simple language.

Q. (By Mr. Mueller): Referring to the bearings marked for identification Defendant's Exhibit T-2 and T-3, did those bearings operate and con-

(Testimony of M. F. Spotts.)

tinue to roll in the test equipment while the test equipment was operating? A. They did so.

Q. And is it your position from observing those rollers while they were operating and viewing it with a Stroboscope that they stayed skewed while the bearings were rotating, Dr. Spotts?

A. Yes, they did.

Q. The fact that there is an opening on each end of the races of the bearings marked for identification T-2 and T-3—would the fact of those openings in and of themselves cause the rollers to skew in those bearings while the test equipment was operating?

A. No, sir, that would not be because of the skewing. [245]

* * * * *

Q. Dr. Spotts, was there a load applied to each of the bearings, Defendant's Exhibits T-2 and T-3 while this test equipment was operating? And will you tell us what that load means so that the jury can understand it?

A. There was a load applied to the bearings. The load came from the two belts, the tension in each of the strands of the belt. The loads were applied from the belt at a small angle to the pulley which was tending to bring the two races out of parallelism with each other.

Q. That is the two races on each of the bearings, T-2 and T-3, were forced out of parallelism to simulate skewing?

A. Yes, the bearing T-2 and also in T-3 was

(Testimony of M. F. Spotts.)

twisted around by the fact that the belt pulls and did not come in squarely with the bearing.

Q. And that misalignment between the outer race and the inner race of each bearing T-2 and T-3 is the misalignment that we are talking about when we refer to any of these guide roll bearings in suit? A. That is the misalignment.

Q. And that is the misalignment we are talking about with respect to the prior art—misalignment between each of the raceways or race rings of the bearing containing rollers in between. ..

A. Yes, it is the lack of parallelism between the two races. [246]

Q. Referring to the prior art, to the Zahn British patent 17841 on the blackboard—or on the easel, I am sorry—so far as affecting roller skewing is concerned, how does the two guide rail structure in the bearing of Fig. 6 operate with respect to skewing?

A. The bearing in Figure 6 of the Zahn British patent—

Q. Dr. Spotts, you might take Figure 4 first and show what two guide rails mean there, if you will, please.

A. In Figure 4 of the Zahn British patent there is a guide rail (g) attached to the rotating shaft. There is one on the left and there is another one on the right, and these guide rails extend up into the recessed portion in the rollers. Then when there is skewing the—

(Testimony of M. F. Spotts.)

Q. And that skewing would be in the roller (a) in Figure 4, Dr. Spotts?

A. A skewing in the roller (a) with respect to shaft (b) and the outer ring (c). That skewing will eventually bring the roller into contact with guide rail (g); it will touch at one side or the other, the shoulder of the recess contacting the rail (g).

Q. Referring to Fig. 6, that of course is a broken away section. Is that a common way of showing a broken away section in drawings?

A. That is common engineering practice.

Q. And can you say, Dr. Spotts, from reading [247] the British patent that there would be two guide rails if that was merely illustrated in full? I am referring to Figure 6.

A. If Figure 6 would be completed and the broken away parts shown in the drawing, there would be a guide rail (g) on each end of the roller.

Q. And that guide rail (g) will you please state where that is?

A. It is located—the guide rail (g) in Figure 6 of the British drawing is located and attached permanently to the outer race (c) by means of screw (t).

Q. And the roller (a) is the load carrying roller in Figure 6?

A. Yes, load carrying roll (a), in Figue 6, carries the load that is placed upon the bearing.

Q. Referring to the Kempster patent 585,580 on the easel, will you please refer to Figure 2 of that? Will you please state what happens in case

(Testimony of M. F. Spotts.)

of misalignment between the races in the bearing of Fig. 2, and just simply show that which would happen in that bearing.

A. In Fig. 2 of the Kempster patent misalignment means that the shaft becomes tipped, would become tipped slightly to the outer race. Shaft 8 becomes tipped slightly to the outer race 2. In that case the roller 6 will be carried into a position of misalignment or its axis will assume a position not parallel to either of the races. [248]

Q. And would the roller 6 and the other roller corresponding to 6 as in Fig. 1—would those skew if there was misalignment between the outer race and the inner race represented in the journal 8?

A. Yes, those rollers will skew.

Q. And would they be limited by the combination of the inner raceway on the journal 8 and the outer raceway within the outer race ring as well as the guide rail?

A. Yes, they would be confined by the bodies you mentioned, the inner race ring and outer race 2 and the guide rail 4.

* * * * *

Q. (By Mr. Mueller): Dr. Spotts, will you please look at this model marked for identification Defendant's Exhibit U and tell us what it is.

A. Defendant's Exhibit U for identification is a scale model of the bearing shown in Kempster patent 585580.

Q. And what figure on the Kempster patent does that model compare to?

(Testimony of M. F. Spotts.)

A. It would compare with Figure 1 and Figure 2 of the Kempster patent. [249]

Q. But the model marked for identification Defendant's Exhibit U does not have a shaft in it; is that correct, Dr. Spotts?

A. No, it does not have the shaft. The shaft is missing. I am sorry; I forgot that. No shaft is present in the one I hold in my hand.

Mr. Mueller: Your Honor, this is a model merely to illustrate, with a plastic exterior construction such as that in Figs. 1 and 2. May that be handed to the jury by the bailiff merely to examine?

The Court: Can't they see it if he just holds it up? It is big enough, isn't it?

Mr. Mueller: Whatever you say, sir.

The Court: They can see it from there, I take it.

Q. (By Mr. Mueller): Dr. Spotts, in the Kempster patent 585580 if the bearing such as that in the model which you hold in your hand and the shaft 8 are separated, will the rollers in the bearing remain in the outer housing?

A. Yes, the rolls stay in the outer housing.

Q. What accomplishes that?

A. The rollers are held pressed outward. The rollers are held in the outer housing by means of spring number No. 10, which is shown in detail in Figure 9 and Figure 10. Then in the assembly of the bearing it is item 10 and Figure 10, and 10 in Figure 2. [250]

Q. And that bearing such as the model marked for identification Defendant's Exhibit U can be

(Testimony of M. F. Spotts.)

transported in that form without the rollers falling out? A. Oh, yes, it could be shipped.

* * * * *

Q. (By Mr. Mueller): Dr. Spotts, will you please identify that chart? Will you please tell what the chart marked for identification Defendant's Exhibit V is?

A. Defendant's Exhibit V represents a reproduction of Figure 2 of the Kempster patent 585580. In fact, it is similar to the Figure 2 of the adjoining chart only on a larger scale.

Q. And at the top have you compared that claim with claim 9 of the Stallman patent 2,334,227?

A. Yes, I have, with claim 9 of the Stallman patent.

* * * * *

Q. (By Mr. Mueller): Dr. Spotts, I am going to give you the substance of claim 9 of the Stallman patent in suit and will ask you as we take each element to apply it to prior art if you do or do not find it there.

"A bearing comprising a cylindrical inner race"——

A. The cylindrical inner race in Figure 2 of the Kempster patent is composed of the shaft shown dashed, body No. 8.

Q. "—an outer race in the bearing."

A. The outer race is element No. 2.

Q. On the outer race itself, Dr. Spotts, is that the inside surface of element No. 2?

(Testimony of M. F. Spotts.)

A. Yes, the inside surface is marked 3 on the Figure 2.

Q. And 2 is the outer race ring of the bearing?

A. 2 is the outer shell itself.

Q. “—a plurality of rolls having reduced portions intermediate their ends interposed between the races.” Will you please point that out?

A. There is a plurality of rolls, element 6, and [252] they are located between the outer race 2 and the inner race 8.

Q. “—a ring carried by the outer race registering within the reduced portions of the rolls to engage the rolls if they become misaligned.” Will you point out that structure?

A. There is such a ring attached to the outer race. That is element No. 4, and it is integral with that race and it registers in the reduced portions of the rolls, 6.

Q. “—a second ring in the reduced portions of the rollers adjacent the inner race to retain the rollers in place against the outer race when the inner race and the outer race are separated.”

A. There is such an inner ring. It is element No. 10 shown in cross section of Figure 2.

Q. Referring to the elements on the full chart of the Kempster patent, elements 9 in Figures 7 and 8, will you please tell what they are?

A. Element 9 at the bottom in Figures 7 and 8 is called a separating disc, and this is used in the assembly to keep the main load carrying rollers separated from each other. It fits into the groove

(Testimony of M. F. Spotts.)ⁱ

that is placed in the main load carrying roller 6 and serves the purpose mentioned.

Q. Would the roller of the Kempster patent in Figs. 1 and 2 operate if those separator discs were removed? A. Yes, it would operate.

Q. And according to the dimensions as shown in the drawing? [253] A. Yes.

Q. We will take claim 5 of the Stallman patent in suit and taking the substance again I will read it to you and will ask if you can find it in the prior art.

Mr. Mueller: And, your Honor, this is prior art not cited by the Patent Office, both Kempster and Zahn, in the brown folder.

The Court: What are you referring to now? Which one?

Mr. Mueller: Zahn 17841.

Q. "Claim 5. A bearing comprising a revolving race and a relatively stationary race, and a plurality of rollers interposed between the races and those rollers having reduced portions intermediate to their ends." Do you find that in the prior art?

A. In the British Zahn patent there are such elements. There are inner races (b).

Q. (By the Court): Are you now using Exhibit Q? Is that Exhibit Q?

A. This is Q. There are outer races, element (c), which appears in Figure 2, Figure 4 and Figure 6. There are load carrying rollers (a) in Figure 2, Figure 4 and Figure 6. These rollers have

(Testimony of M. F. Spotts.)

reduced portions intermediate their ends in the three figures previously mentioned.

Q. (By Mr. Mueller): Now, I will read the remainder of claim 5, and do you find it in the prior art: [254]

“—and means carried by the stationary race only and projecting only into the reduced portion of the rolls to engage shoulders formed by the reduced portions of the rollers in the event of misalignment of the rollers.”

Now, do you find a means in the British 17841 structure which has that function, it is carried on a stationary race only and projects into the reduced portions of the rollers?

A. It would refer to Figure 6, because in this case race (c) is stationary and the guide rail means or ring (g) is attached to the stationary race permanently by the screws (t) and this guide rail projects into those reduced portions that appear in the load carrying roll (a).

Q. Does the projection of the rail (g) into the reduced portions in the rollers (a) have any effect on the rollers if there is misalignment of them in the bearing?

A. Yes, they would come into contact with the rollers in case the rollers would skew.

Q. Now, referring to claim 3 of the patent in suit, Stallman patent 2,334,227, I will read the substance of that claim and I will ask you if you find that in the prior art:

(Testimony of M. F. Spotts.)

“A bearing comprising a rotatable inner race and a relatively stationary outer race.”

A. I find a rotatable inner race (b) in Figure 6 of the Zahn British patent, and a relatively stationary outer race (c) in the same figure. [255]

Q. That is Zahn British patent 17841, is that correct? A. It is.

Q. Do you find in the prior art, “rollers interposed between the two races and having aligned reduced portions intermediate their ends”?

A. Yes, in the same Figure 6 of the British Zahn patent there are such rollers (a) and they have reduced portions (g) intermediate their ends.

Q. Continuing with claim 3:

“A ring carried by the outer race and projecting into the reduced portions of the rollers to prevent their longitudinal movement.”

Do you find that?

A. Yes, in Figure 6 of the British Zahn patent I find ring (g) attached to the stationary race (c) by means of screws (t).

Q. And concluding with claim 3:

“A second ring registering with and permanently contained within the reduced portions of the rollers to hold the rollers in position in the outer race when the inner race is removed.”

Do you find that, Dr. Spotts?

A. I find such a ring in Kempster patent 585580. It is element No. 10. It is shown in Figure 1 and in Figure 2 and in Figure 3 and is shown in detail in Figures 9 and 10.

(Testimony of M. F. Spotts.)

Q. Is there any other patent in the prior art [256] in the answer which shows such a ring with that function, to which you can point, Dr. Spotts?

A. There are a number of such rings shown in the prior art. I could name a couple.

Q. Do you have the prior art patents with you?

A. Not all, no.

Q. Will you please look at Rydbeck patent 1979707 which is in the Defendant's Exhibit, the arts cited by the Patent Office in the green cover? Do you have that?

A. I have Rydbeck.

Q. Will you hold that up and explain the ring having the function which I read to you, if you find it there?

A. In this Rydbeck 1,979,707, there is such a ring. It is shown in detail in Figures 3, 4 and 5, and then in the assembly of the complete bearing it is marked as element No. 6 in Figure 2. It registers with the reduced portion of the rolls.

Q. Referring, Dr. Spotts, to the chart of the Stallman patent 2334227, is there such a retaining spring in the bearings there illustrated, and will you please point it out?

A. Yes, in the Stallman patent Figure 1, ring No. 16 is such a ring. 16 appears in Figure 1, 16 appears in Figure 2, also in Figure 4. In Figure 5 there are such rings, No. 22.

Q. After the bearing of the Stallman patent is installed in a machine, do those rings which you [257] have just identified have any function?

A. No, they do not.

(Testimony of M. F. Spotts.)

Q. They are there solely for the purpose of holding the rollers in the bearing while it is being transported; is that correct, Dr. Spotts?

A. If it should be transported with the inner race removed, they hold the bearings in place.

Q. In the Stallman patent 2,334,227, actually Figures 1, 2, 3, 4 and 5 each have an inner ring.

A. That is correct.

Q. So that they do not need, as they are illustrated, a spring for holding the rollers in the outer race; is that correct? A. I lost the sense.

Q. As the ring is illustrated in Figs. 1, 2, 3, 4 and 5, that spring, the retaining spring, has no function when the inner ring is assembled with the outer race? A. No, sir, it does not.

Mr. Mueller: I would like to take claim 4 in substance from the Stallman patent and that concludes claim 3, 4, 5 and 9 which are charged to infringe, your Honor. Now, I will shorten this up and do it differently, Dr. Spotts, if I may. Referring to Figure 6 of the British patent 17841 on the easel, will you kindly tell us whether there is a revolving race in that bearing and identify it if there is? [258]

A. In Figure 6 of the British Zahn patent shaft (b) constitutes the inner race.

Q. Are there a plurality of rolls or rollers in the bearing of Fig. 6 which are interposed between the races (b) and (c) of that bearing?

A. There is such a plurality of rolls; it is marked element (a) in Figure 6.

(Testimony of M. F. Spotts.)

Q. Is it proper to consider Fig. 6 as having a plurality of rollers, Dr. Spotts?

A. Yes, it is. It is common engineering practice in a cross section of this kind to assume that there would be more than the single roller that is shown here at the top.

Q. And Figure 3—can you explain whether that shows the plurality of rollers?

A. In Figure 3, yes, we have a cross section transverse to the bearing and roller (a) appears all the way around the circumference.

Q. Referring again to Figure 6 of the British patent 17841, can you find and identify a structure that is carried by the stationary race only of that bearing and with that structure engageable with the rollers in the bearing intermediate the ends of the rollers?

A. In Figure 6 in stationary outer race (c), there is a guide rail (g) permanently attached to the race (c) by the screws (t), and this guide rail [259] extends down into and registers with reduced portions in the load carrying rollers (a).

Q. What is the function of the rail (g) in Fig. 6 with reference to the concluding phrase of claim 4 that the means engages the rollers in the event they become misaligned with their normal position?

A. The function of ring (g) in Figure 6 is to make contact with the shoulder of the recess in the roller (a) and to stop its longitudinal motion and assist in limiting the amount of skewing.

Q. Will the structure of the Heim patent

(Testimony of M. F. Spotts.)

1885914 on the reproduction of that drawing that I have just placed upon the easel — would that structure limit the misalignment or skewing of a roller in the bearing if misalignment occurred during operation of the bearing?

A. Yes, this structure would eliminate such misalignment in the Heim patent.

Q. Will you identify the structure that would be involved in the operation and the end result, please?

A. The rolls 15 have a reduced portion intermediate their ends. These rolls register with the guide ring 16. That appears in Figure 3, also in Figure 1 and Figure 4 and Figure 5. If the roller skews and moves endwise, the shoulder of the recess will come into contact with the guide rings and will thereby be limited in its motion.

Q. That limitation is also related and also must [260] be considered with reference to the confinement of the roller between the outer race ring and the inner raceway? A. That is correct.

Q. And does such confinement show in Figure 1 of the Heim patent? Are the rollers there shown as confined between races?

A. Yes, the rollers are confined between the inner race 17, which is the shaft, and the outer race 12.

Q. Now, considering the guiding effect of the rail in the bearing of Heim 1885914, if the rollers skew in that bearing, comparing that with the guiding effect of a rail in the bearing of the Stallman

(Testimony of M. F. Spotts.)

patent 2334227, is the guiding effect of the rails in each patent generally the same?

A. Yes, it would generally be the same. [261]

* * * * *

Q. Dr. Spotts, will you please refer to the chart marked for identification Defendants' Exhibit W and I will take you through that chart to save time, Dr. Spotts, if I may. Referring to Figure 1, which [262] is marked Figure A on the chart, have you compared that with Figure 1 of the Heim patent 1885914, and can you say that it is a photostatic reproduction of Fig. 1 of the Heim patent?

A. Figure A of Defendant's—

The Court: Yes or no. I just want to shorten it. Is the answer yes?

The Witness: The answer is yes with the exception of two notations which have been placed on the chart here.

Q. (By Mr. Mueller): And those notations are merely for illustration? A. Yes, sir.

Q. Taking Figure C of the chart, is that a reproduction of Figure 3 in Heim 1885914?

A. Yes, it is.

Q. Taking Figure F in the chart—

The Court: Can't you make one question to cover it? All these are reproductions?

Mr. Mueller: They are not.

The Court: Very well.

Mr. Mueller: That is why I am doing it in this way.

Q. Taking Figure F, except for the rotating

(Testimony of M. F. Spotts.)

housing and fixed shafts, is that figure a reproduction of Figure 2 of the Kempster patent 585580?

A. It is, with the exceptions you mentioned.

Q. Taking the figure in the center, Figure D, [263] have you prepared that illustration with an actual guide roll bearing such as sold by the defendant, and is that a fair representation of a guide roll bearing?

A. It is a fair representation of a cross section through a guide roll bearing.

Q. Referring to Figure B at the left hand corner of the chart, will you please look first at the bearing represented by the rollers and will you give me the number, please?

A. The rollers in No. 14 in Figure B.

Q. The rollers 14 and the outer race rolls at guide roll 16, have you compared those?

A. The rollers are No. 14 in Figure B.

Q. The rollers, 14 and the outer race 12, and the guide roll 16; have you compared those with Fig. 1 of the Heim patent and are those accurate illustrations of the bearings in Figs. 1 and 3 of the Heim patent 1885914?

A. I would say that Figure B was, these parts of Figure B were.

Q. Referring to Figure B on the chart, Defendant's Exhibit W, is that an illustrative mechanism shown there and identified as a fixed housing, a rotating shaft and rotating wheels? Are those representative illustrations of such elements, Mr.—Dr. Spotts?—referring to Figure B?

(Testimony of M. F. Spotts.)

A. Yes, they are.

Q. And are they representative for the purposes [264] of illustration of the members 10 and 19 in the Figure A of that chart as well as the shaft 17?

A. Yes, 10 and 19 are representative.

Q. They are representative of the structure above in Figure A? A. They are.

Q. Does the structure in Figure B on the chart simulate or represent rotating wheels and a rotating shaft and a fixed housing? A. Yes, it does.

Q. Referring to Figure A, as the Heim structure is illustrated there, do you have a rotating housing? A. We do.

Q. And a fixed shaft?

A. Yes, that shaft is fixed in this Figure A.

Q. And the mounting?

A. The mounting members, 19.

Q. They could correspond for illustrative purposes with the members 19 below?

A. They could.

Q. Will you take Figure E on the chart marked for identification Defendant's Exhibit W? Is that bearing illustrated in Figure E an accurate illustration of the bearing in Figure F of the chart?

A. It is accurate with one exception. In F there [265] is no shaft shown dotted as element 8.

Q. That is, there is the shaft in Figure F and no shaft in Figure E? A. Yes, that is so.

Q. But the bearing as illustrated in Figure E, does that correspond to the bearing reproduced in Figure F of the chart? A. Yes, it does.

(Testimony of M. F. Spotts.)

Q. Referring to the righthand figure identified as (g), is the bearing in the center part of that illustration an accurate illustration of the bearing in Figure F of the chart? A. Yes, it is.

Q. And does the bearing—and you are referring, Dr. Spotts, with your pointer to the mechanism that includes the roller 6—does that roller in Figure (g) correspond to the bearing in Figure (e) of the chart?

A. Yes, the bearing itself does.

Q. In Figure (g) of the chart, is there a fixed housing and a rotating wheel and a rotating shaft shown with the bearing?

A. There is a Figure (g).

Q. And that mechanism in Figure (g) of the chart, is that an illustrative mechanism to show a bearing such as the bearing in the Kempster patent shown in Figure (f)? A. It is.

Q. Dr. Spotts, referring to Figures (c), (g) and [266] (e) on the chart, are those each illustrative of the bearings as they would be sold in the normal course of business? A. They are.

Q. Do they each include an outer housing?

A. They do.

Q. Rollers within the outer ring or housing?

A. They have rollers.

Q. And in each of the Figures (c), (d) and (e), is there a guide rail shown extending into recesses in the rollers?

A. There is a guide rail in each of the Figures (c), (d) and (e).

(Testimony of M. F. Spotts.)

Q. As those bearings are illustrative in Figures (c), (d) and (e) it is not possible to tell whether the bearing is a stationary installation or a rotating installation; is that correct, Dr. Spotts?

A. I can not tell in Figures (c), (d) and (e) whether the outer race rotates or whether it would be fixed.

Q. Is that just a bearing with no consideration of movement?

A. That is so.

Q. Referring to the bearing and the mechanism of Figure (a) and the mechanism and the bearing in Figure (b) of the chart, Defendant's Exhibit W, in your opinion, is there any difference in the bearing operation in the difference structures illustrated, the different installations illustrated in Figures (a) and (b)? [267]

A. No—

* * * * *

Q. (By Mr. Mueller): Referring to Figures (a) and (b) in the chart, Dr. Spotts, would you expect a guiding effect for the bearing in Figure (a) with a outer, rotating housing that compares with the guiding effect of the bearing in (b) with a fixed outer housing for the bearing?

A. I would.

Q. You would expect that the guiding effect could be generally the same in the two installations, Figures (a) and (b)?

A. That is what I would except.

Q. Referring to Figures (f) and (g), and in Figure (f) we have illustrated a rotating outer race ring and in Figure (g) the outer race ring, too, is

(Testimony of M. F. Spotts.)

[268] fixed; would you expect to have the same general guiding effect from the guide rail in each of those two bearings, in (f) and (g) of the chart marked for identification, Defendant's Exhibit W?

A. I would.

Q. And in the Figure (f), the shaft constituting the inner race is a fixed shaft, is that correct?

A. That is correct.

Q. That is the way it is illustrated?

A. That is correct. [269]

Q. And in Fig. G the shaft is illustrated as rotating? A. That is correct.

Q. Referring to the illustration of a bearing such as the defendant's Guiderol bearing in Figure B of the chart, from your experience with such bearings would you expect that there would be a guiding effect in that bearing, that is, a guiding effect on the rollers of defendant's bearing, whether the outer race ring is fixed or is rotating?

A. I would expect to find no difference.

The Court: What was the answer?

The Witness: I would expect to find no difference.

Q. (By the Court): You mean the guiding effect of the structure would be approximately the same?

A. Yes. [270]

* * * * *

Q. Dr. Spotts, I hand you two models marked for identification Defendant's Exhibits Y and Y-1, merely because they are identical, and they are

(Testimony of M. F. Spotts.)

shown to you as illustrative of a bearing in accordance with Fig. 5 of the Heim patent. Have you examined those two models, Dr. Spotts, and what can you tell us about those? [271]

A. I have examined the two models and compared them visually with Figure 5 of the Heim patent and they appear to be very good embodiments of this figure.

Mr. Mueller: They are merely plastic housings, your Honor, merely to show the containment of rollers in a housing such as Fig. 5 of Heim. We are not going to operate them. As you will note, there is no volt figure of any of the bearings in the Heim patent 1885914.

Mr. White: This witness testified that he compared them visually. If he puts his finger it in, your Honor, he finds out that the purported copy of the Stallman bearing does not rotate, or it is very difficult to rotate, but the Heim bearing rotates very nice and easily, so he reversed the clearances in the different patents, and that is a fake.

Mr. Mueller: Now, your Honor, that is a strong charge, which I deny and resent. That is completely improper. You can see very easily yourself that that is merely an illustration of Figure 5.

The Court: I can't see it but maybe the witness can testify to it. I assume that is what it is.

Mr. Mueller: It is a plastic housing, and the roller 27, of course, is transparent. It was merely to help visualize a structure which we have tried to do.

(Testimony of M. F. Spotts.)

The Court: Counsel can cross examine on it. He can testify to what it is. He has already done that. [272] He has already stated that that is a graphic representation of his view as to what that Figure 5 of the Heim patent discloses.

Mr. Mueller: Just as rollers and outer housing and inner retaining ring, your Honor.

The Court: That is right.

Mr. Mueller: These two models are exactly the same character and they have been marked for identification as Defendant's Exhibit X and X-1 because they are identical.

Q. Dr. Spotts, will you state what they are from the standpoint solely of graphic illustrations?

Mr. White: May I interrupt, your Honor, at this time? Counsel has stated that this was merely a representation of the housing, rollers, and the inner retaining ring. Do we understand that those are not representations of the guide rail and the track?

Mr. Mueller: There is a guide rail in the outer race ring, Mr. White, of Figure 5.

Mr. White: I say, are these also correct representations of the guide rail?

Mr. Mueller: They are graphic illustrations of the guide rail 27 in Figure 5 of the Heim patent, that is correct.

The Witness: Yes, all the parts in the model agree with the drawing.

Q. (By Mr. Mueller): From a graphic, illustration standpoint? A. Yes, sir. [273]

(Testimony of M. F. Spotts.)

Q. Will you state what those models that you have in your hand are as graphic illustrations in plastic housings?

A. Those exhibits for identification X and X-1 represent graphic models of Figure 1 of the Stallman patent. The outer housing or race has been made out of plastic in this case so that we can see the construction better.

Q. Both of the models, Dr. Spotts, are merely transparent, visual models to show the inside construction of the Stallman and the Heim bearings, is that correct?

A. That is correct.

Q. You cannot see the internal construction through a steel or metal race ring, is that correct?

A. That is correct.

Q. Would you say that the two models marked for identification Defendant's Exhibit X and X-1 are from that standpoint visual illustrations of a bearing according to the Stallman patent?

A. I would. [274]

* * * * *

Q. Dr. Spotts, were any of the four models, Defendant's Exhibits X, X-1, Y and Y-1, offered for the purpose of operation of the bearings?

* * * * *

Q. (By Mr. Mueller): There is no operation that was intended by those, is that correct, Dr. Spotts?

A. That is correct.

Q. And they were not intended to illustrate an operation of either bearing such as we have been discussing during your testimony?

(Testimony of M. F. Spotts.)

A. No, they were not.

Q. Dr. Spotts, referring to the chart of the British Zahn patent 174841, are the elements F in Figures 2, 4 and 6 spacing rollers?

A. They are. [276]

Q. What is the function of the spacing rollers (f) in Figs. 2, 4 and 6 of the Zahn British patent?

A. The spacing rollers (f) of the Zahn British patent have the function of keeping the loaded area of rollers (a) separated from each other so they don't touch on the side.

Q. Would the bearing according to Figs. 2, 4 and 6 of the Zahn British patent operate if the spacing rollers were removed?

A. It would, providing you would fill up the space with some additional load carrying rollers (a).

Q. And if the spaces were filled up, then would a bearing according to the Zahn British patent operate to effect skewing of the rollers with or without the spacing rollers (f)?

A. A study of the drawing leads me to say that it would.

* * * * *

Q. Dr. Spotts, if you put a guide rail on both the inner race and the outer race of a roller bearing, will that bearing operate satisfactorily?

A. Yes.

Q. A guide rail fitting into the recess in the roller on both the inner and outer raceways?

A. Yes.

(Testimony of M. F. Spotts.)

Q. And that is in contrast to a single guide rail as 4 in the Kempster patent Fig. 2? [277]

A. Yes, it is. [278]

* * * * *

Cross Examination

Q. (By Mr. White): Doctor, you have before you these exhibits X and Y, I believe are the numbers. A. Yes, sir.

Q. And the Exhibit X—try to turn those bearings on the inside.

* * * * *

A. I can turn them quite readily, Mr. White.

Q. (By Mr. White): I am handing you Plaintiff's Exhibit 5-A. Try to turn that.

A. Yes, I can turn these rollers, too.

Q. Which is easier to turn?

A. The 5-A is easier.

Q. It is much easier, isn't it?

A. It is considerably easier.

Q. Now, try and pick up that Exhibit Y, the [280] so-called exact duplicate of the Heim patent, and try to turn that.

A. These turn very readily.

Q. They turn much easier even than the McGill bearing of 5-A, isn't that true—of Plaintiff's Exhibit 5-A?

A. No; I would say that this Plaintiff's Exhibit 5-A was easier.

Q. When you said, taking that Defendant's Exhibit Y, and you said that that was a correct illus-

(Testimony of M. F. Spotts.)

tration of the bearing of the Heim patent—now, after examination do you still think so?

A. Yes, it is a good representation of the drawing.

Q. Of the drawing. Now, did you look at the clearance between the rail in the Heim patent and the shoulders on the opposite sides of the reduced portion? Is there any clearance in the Heim drawing?

A. What kind of clearance do you mean, Mr. White?

Q. I mean, is there any clearance between the sides of the rail in the Heim drawing and the shoulders? Look at the drawing.

A. Oh, you mean off the drawing.

Q. Off the drawing.

A. The drawing—if I get your question correctly, you are referring to clearance right here between——

Q. That's right; in either figure.

A. No, the drawing itself doesn't indicate any opening between the shoulder and the rail. [281]

Q. Now, then, look at the drawing of Mr. Stallman and see whether it indicates any opening.

A. Yes, he indicates an opening in there.

Q. Isn't it true that the tighter and closer fit there is between the shoulders of the reduced portion of the roller and the sides of the guide rail, the harder it is to move?

A. It would be so if they would be so tight that they would rub rather hardly against the sides, they

(Testimony of M. F. Spotts.)

would; but with some nominal clearance in there, I don't think you could tell any difference.

Q. Now, isn't it true that in the model you have in your hand, Exhibit X, that clearance is much smaller than it would be in the model, Exhibit Y, or would you know?

A. This one is X.

Q. Yes.

* * * * *

A. The endwise clearance on the rollers in X is larger than it is in Y.

Q. The what clearance?

A. Endwise. Endwise clearance in the roller.

Q. How do you know?

A. Well, I can shove them back and forth with my thumb and finger in X. You can't do it in Y.

Q. And what makes them tight? What makes Exhibit X tighter than Exhibit Y?

A. It isn't.

Q. It isn't tighter?

A. No, this is X. This is the one that has the clearance and it is X.

Q. What makes Exhibit X harder to turn than Exhibit Y?

A. It could be a number of factors on that. The retaining spring might press a little harder against the rollers and the rollers might be packed in a little tighter. I would think those would be the two principal reasons for the difference in the ease with which the rollers would be moved.

Q. Do you still consider Exhibit X and Exhibit

(Testimony of M. F. Spotts.)

Y as a fair comparison of the structures of the Stallman patent and the Heim patent?

A. Yes, I think I still do.

Q. That is all on that particular subject.

By the way, on the Heim patent, did you read that patent?

A. Yes, I have read the patent.

Q. And what clearance does the patent call for?

A. I don't believe that Mr. Heim discusses the subject of the type of clearance you are referring to.

Q. Look on the second page of the Heim patent on the top of the second column.

A. Yes, I believe I see the line to which you refer. [283]

Q. All right; now read it.

A. "It is immaterial whether or not the supporting member fits closely against the side walls of the groove in the rolls and, in fact, it is not of material importance that the member actually be located in this groove, the real advantage, however, being that the groove acts to prevent any possibility of the supporting member dropping out of the bearing as might possibly occur if the member merely acted against the cylindrical portions of the roll."

Q. And which member are you describing now in what you were reading?

A. That is referring to supporting member 16, Prime, 16'.

Q. That is the inner spring ring, isn't it?

A. Yes, it is.

(Testimony of M. F. Spotts.)

Q. The inner spring ring—the jury knows which that is. You made a mistake. If you went to the top of that column, you would have found the fit on the rail. You can start with the sentence at the bottom of the second column which says: “In this case it is advisable to make the groove 23 corresponding to the groove 15 on Fig. 3 likewise substantially square in cross section, so that it will closely fit above the ring.”

A. Yes, I see this.

Q. So it calls for a closer fit, doesn't ?

A. It says, “closely.” [284]

Q. And what is a close fit?

A. There can be degrees of closeness, and a close fit might mean something one place and might mean something else some place else.

Q. We can drop that subject. I just wanted to call your attention to it.

I notice here, Dr. Spotts, that after your graduation in 1923 you took a job with Packard—or you went to the engineering training course with Packard for five years, as I understand; then you worked for three years with Jeffrey Manufacturing Company. And what did you do thereafter after you quit Jeffrey Manufacturing Company?

A. I went back to school in 1932 in the days of the depression. I lost my job as many engineers did in those days. I was in school long enough to get the Master's degree that I mentioned, and it was after that that I worked for Jeffreys.

Q. Then you went to school and then you went

(Testimony of M. F. Spotts.)

to Jeffrey and you were with Jeffrey for three years? A. Two.

Q. Two years. And after Jeffrey you went back to school again to get your doctorate?

A. Yes, that is so.

Q. And after you got your doctorate, then you started to teach, is that right?

A. Yes, that is correct. [285]

Q. You have not been back in practical engineering, then, now, for a considerable time; since about 1937 or 1938, is that right?

A. Not for full time employment, I wasn't, but I have spent quite a good deal of time—there was one period for about ten years when I was at Northwestern and in which I spent one day a week in an industrial plant on mechanical design problems.

Q. That was actually for wages or just for——

A. No, sir, they pay me when I work.

Q. By the way, are you on a leave of absence now?

A. No; I have some graduate classes which I will make up after I get back.

Q. And does the University pay for your time for coming out here or does McGill Manufacturing Company pay you for it?

A. I am employed by Mr. Mueller for this trip here.

Q. And he pays you a daily stipend more than the usual witness fee?

(Testimony of M. F. Spotts.)

A. I have no idea about that. We haven't discussed remuneration.

Q. So you don't know how much you are going to get for this case?

A. I wouldn't have the slightest idea, no, sir.

Q. By the way, is this the first patent case in which you ever testified as an expert? [286]

A. I testified once before.

Q. Where was that?

A. That was in Oklahoma City.

Q. How long ago?

A. That was eight or nine years ago.

Q. And those are the only two cases in which you testified as a patent expert; is that right?

A. That is correct, yes.

Q. There was reference made to your book which you published for mechanical engineering, or rather, design of mechanical elements. As I examined the book, is it true that altogether on roller bearings you wrote only about a page and a half?

A. That is so.

Q. And on needle bearings, which are the type of roller bearings involved in this litigation, you wrote one paragraph, is that correct?

A. I presume it is. I don't have the book right here.

Q. I will let you look at it.

A. Well, all right. (Book handed to witness.)

Q. Your answer is——?

A. It is between a third and a half of a page, Mr. White.

(Testimony of M. F. Spotts.)

Q. But it is one paragraph?

A. It is all in one paragraph, yes.

Q. I would like to ask you whether you agree [287] with the statement that "in roller bearings the line contact provides a greater surface under pressure at the loaded points on the races. Consequently the roller bearing has a greater capacity than the ball bearing, size for size, both for normal loads and for shocks or momentary overloads." Do you agree with that statement?

A. I still agree with that, yes.

Q. Do you agree with the statement that "offsetting this increased capacity of roller bearings, the tendency of the rollers to skew increases the friction above that of the ball bearings." Do you agree with that?

A. Yes, I agree with that.

Q. "The rollers must be maintained in accurate parallelism with the races." Do you agree with that, they must be maintained in accurate parallelism with the races?

A. I would say that I have revised my opinion on that point since I wrote that that you are reading.

Q. Did you write this?

A. It sounded like it was coming out of my book. Maybe I am presuming too much on that.

Q. You are presuming too much on that. Let me read some more: "It is evident that two cylinders not parallel with each other with not have a line of contact, but an objectionable form of point contact." Do you agree with that?

(Testimony of M. F. Spotts.)

A. If you will change that to several points of [288] contact, I would agree.

Q. It says, "If the skewing is not kept down and the guiding of the rollers is not of the best, the operating friction may exceed that of a good, plain bearing."

The Court: Exceed what?

Mr. White: —may exceed the operating friction of a good, plain bearing.

A. That is quite possibly true. A good, plain bearing has an exceedingly low friction.

Q. "to make the roller bearing rotate as smoothly and as freely as the ball bearing requires expensive refinement in design and in manufacture in addition to the more complicated shapes for machining and grinding." Do you agree with that?

A. Yes, I would.

Q. "The tendency of the rollers to skew or the increased friction arises in two ways. The shape of the roller and raceway may not be such as to produce a pure rolling motion." Do you agree with that as one of the causes—the shape of the roller and raceway may not be such as to provide a pure rolling motion? A. That is very likely so.

Q. "Slight deviation from the pure rolling form or slight inaccuracy in dimension will make one end of the roller precede the other." Do you agree with that? A. Yes. [289]

Q. "Secondly; the usual straight roller will skew under the smallest misalignment because one end of the roller will compress more than the other

(Testimony of M. F. Spotts.)

and will have a smaller diameter." That, as you remember, was the testimony of Mr. Stallman. Do you agree with that?

A. Not entirely. The roller upon compression doesn't make a circle any more; it sort of flattens out into an egg shape, and with that qualification, I think the statement is largely true.

Q. Well, this exact statement—you mentioned that your sources of information for your textbook were the catalogues of the large bearing companies, didn't you?

A. Yes.

Q. Well, I was reading from an engineering and designing handbook by SKF. Do you agree that SKF is a large bearing company?

A. Yes, they are a large company.

Q. Are they the largest, as a matter of fact?

A. I wouldn't know.

Q. I will let you look at that and check the statement.

A. I will take your word for it.

Q. This is an edition of 1924 of the SKF Bearings, copyright 1924, SKF Industries, Inc.

A. Yes.

Q. Now, then, we could agree in this case, [290] couldn't we, that skewing does make a difference in the effectiveness of a bearing?

A. It does make a difference.

Q. When you were testifying that the skewing is not remedied and the rollers are not brought back into straight position, then they just keep on rotating around in the skewed position?

(Testimony of M. F. Spotts.)

A. Yes, sir.

Q. Always? A. Yes.

Q. And you said, if I remember correctly, that that didn't make much of a difference. Do you want to change your testimony in that respect?

A. I would like to look at the record. If that was at the end of the day when we were talking about the model, or whether it was a straight question.

Mr. White: Yes, I will read the record.

The Court: I think you said that to me in answer to a question, or something to that effect.

The Witness: When we were discussing the model at the end of the day?

The Court: I don't recall.

The Witness: Well, I was—if the skewing has no effect—it doesn't have very much effect in the model.

Q. (By Mr. White): You meant only this [291] particular model, is that right? Did you mean that under actual working conditions if the rollers remained skewed all the time, it would make an important difference?

A. Rollers can remain skewed all the time. It is the degree of the skewing in connection with the amount of the load the bearing is carrying—the combination of the two factors—that is going to determine whether there will be success or failure in the bearing.

Q. I was asking you to determine under nor-

(Testimony of M. F. Spotts.)

mal working conditions, with the normal load on the bearing.

A. Then I would say that the maker would rate the bearing so that it should be satisfactory when it is applied according to his rating.

Q. Your answer is that the manufacturer will rate the bearing? A. For load capacity.

Q. In other words, you provide a good big bearing for a smaller load; is that what you have in mind?

A. Well, he decides. He decides how much load his bearing should carry and the customer in general abides by that. [292]

* * * * *

Q. (By Mr. White): You admit that the McGill bearing skews all that time as it goes around, don't you? That is what you demonstrated to the jury here.

A. As far as our testing goes, it would appear that that would be so.

Q. To your knowledge, does McGill Manufacturing Company make a special allowance in rating so that the bearings can run around in a skewed position?

A. I don't know how the McGill Company rates their bearings.

Q. Did you examine the McGill bearings upon your own initiative or upon the request of McGill Manufacturing Company?

A. No, McGill never requested anything of me.

(Testimony of M. F. Spotts.)

Q. Who requested you to examine these bearings?
A. Mr. Mueller.

Q. And when was the first time that you saw one of these McGill bearings?

A. About a year ago.

Q. And what was the occasion for seeing the bearing?

A. I got a letter from Mr. Mueller saying that he was preparing a defense in a roller bearing case and that he would like to have me do some engineering work for him.

Q. What was the engineering work you did for him?
A. Would you repeat that?

Q. What was the engineering work you did for him? [293]

A. I went down to his office some days later and we talked over the matter and it appeared that it would be quite helpful if we could get some more information on this subject of skewing.

Q. Then what did you do in order to get more information on the subject of skewing?

A. We thought some tests would be the most reliable way of finding that out.

Q. Didn't you know previously, looking at Fig. 6, Stallman patent, that plain roller bearings were skewing? Didn't you know that?

A. Oh, I knew that many years ago.

Q. What corrects the skewing on a plain roller bearing of the type of Fig. 6 in the Stallman patent drawing there?

(Testimony of M. F. Spotts.)

A. To my own knowledge, the skewing is not corrected.

Q. What happens?

Mr. White: Excuse me. I will clear this so that the jury can see. [294]

I refer you to Fig. 6 of that Stallman patent drawing. We might discuss just what happens when skewing occurs on the plain roller bearing. That is the kind you know about.

A. Figure 6 of the Stallman patent is a very special kind of a plain roller bearing.

Q. Wherein is it special? The jury wants to know that, I think.

A. Special because the rollers are long and thin, because the end motion is prevented by flanges or other members at the ends of the rollers; there is no gauge or separators in the bearing to keep the rollers apart. Those are the principal differences.

Q. That is what you call what?

A. It ordinarily goes by the name of needle bearing.

Q. That is nothing special, is it?

A. No, but it is certainly distinct from other types of roller bearings.

Q. You did not say so in your book, did you? You just listed it as one type of roller bearing.

A. Then I will take back the words "special type." I will say it is a type of roller bearing.

Q. I just want to correct an incorrect impression. Isn't it true that these little bearings, since

(Testimony of M. F. Spotts.)

they were little bearings, had those flanges on the opposite sides that you mentioned there, at the opposite ends of those bearings or rollers? [295]

A. Are you asking me if there are flanges at the ends?

Q. You mentioned it was special in that respect, but isn't it true that is standard with any kind of common needle bearing?

A. That is standard in any needle bearings and it is also standard to have guide rails in needle bearings.

Q. Fig. 6?

A. Oh, no, not in Fig. 6, no. This figure just illustrates one bearing.

Q. Did you say extended to have guide rails in the bearings? Point out in your book where you show one of those standards. You described all the standards presumably.

A. The book was written before I became acquainted with this type of bearing. I didn't know about it when I wrote the book.

Q. So far as you are concerned the kind of roller needle bearings with a guide rail were new to you up to the time that Mr. Mueller called you up?

A. Probably were. I could have heard of them before but I had not seriously given thought to them.

Q. Then it would be your testimony that so far as the time of your visit to Mr. Mueller was concerned, you would consider a roller bearing with

(Testimony of M. F. Spotts.)

a guide rail as old or new? I am referring now to the time when Mr. Mueller called you in the case. [296]

A. You mean do I think——

Q. Not what you think now. I am trying to refresh your memory of what you might have thought about it. Mr. Mueller called you in, and before you saw all these patents, prior patents that were thrown at you, at the time when Mr. Mueller called you in the case—do you remember the time?

A. Yes, I do.

Q. You got a letter from him? A. Yes.

Q. And he talked about Guiderol bearings, didn't he? A. Yes.

Q. And he showed you some bearings which had guide rails on them, didn't he? A. Yes.

Q. Was that the first time you saw such bearings?

A. The first time I examined them in detail.

Q. Did you see before then any such guide rail bearings, Dr. Spotts? We have to talk so the jury understands us. A. I don't believe I did.

Q. Then the answer was no, wasn't it?

A. All right, it is no.

Q. So, so far as you were concerned, the guide rail in a roller bearing was new up to the time you were called into the case by Mr. Mueller? [297]

A. Yes, sir.

Q. And you testified on direct examination that your source of material for Chapter 9 of your book were the catalogues of the various manufacturers

(Testimony of M. F. Spotts.)

of bearings, is that correct, ball and roller bearings? I am jumping from point to point to make the examination shorter, but I would like to call your attention now to this demonstrator here. Isn't it true that these two bearings in Defendant's Exhibit T move at different speeds?

A. So far as I know they are moving at the same speed.

Q. So far as you know, you were using a Stroboscope, an instrument like that, is that true?

A. Yes, I was using a Stroboscope.

Q. That Stroboscope was synchronized, not synchronized but approximately synchronized with the bearing T-2 on the left hand side facing the jury, is that right? A. Yes.

Q. And it was not synchronized as well on the bearing T-3 on the right hand side facing the jury?

A. You may have had to make minor adjustments, but at the same time if I had kept the light on the T-2 bearing, I probably would have had to adjust there also. The speed varies a little bit.

Q. All right. It varies. That is what I wanted to know. Does it move slower or faster? [298]

A. I mean the speed of both varies.

Q. Speed of what varies?

A. Speed of both pulleys varies.

Q. That would vary the rotation of the bearing also, wouldn't it?

A. Yes, both of them simultaneously.

Q. You mean it varies between the time you

(Testimony of M. F. Spotts.)

shift your stroboscope from one bearing to the other? A. It could.

Q. Well, did it in every case, when you shifted your stroboscope from bearing Exhibit T-2 to bearings Exhibit T-3 there was a change? One was clearer, T-2 was clearer than T-3? That would indicate, considering the constant vibration of the stroboscope, that the speed was different, wouldn't it?

A. I do not believe I would agree with that.

Q. Try it now.

A. Could I give a reason for my answer?

Q. Go ahead.

A. We are directing the light of the stroboscope principally on the rollers. The outer races no doubt go around at the same speed but the rollers are going around at approximately half the speed. That speed of the rollers will vary a little bit if the friction is not quite the same in the two bearings, and that is quite to be expected, so that the group of rollers going around in one bearing then [299] could be different slightly from the speed of the rollers going around in the other bearing, even though the pulleys would be exactly the same.

Q. And the belts would have the same tension?

A. Yes, I do not think there was any slip of the belts.

Q. Go over and test those belts and testify whether one of the belts is tighter than the other.

A. One belt is probably tighter than the other.

Q. Don't say "probably". I want you to look

(Testimony of M. F. Spotts.)

at it. We do not want probabilities. This can be tested. Just put your finger on it.

(The witness did as requested.)

A. My answer is that the looser belt has enough tension in it to keep the pulleys moving without any slip, the same as the tight one does.

Q. But it is a different tension, isn't it?

A. Now, about the skewing operation, don't you think that the reason for the skewing of this bearing is that the forces which act upon one side of that bearing are greater than the forces that act on the other side?

A. Are you speaking of the forces on the rollers?

Q. On the rollers.

A. Yes, that is the principal cause.

Q. There is an unbalanced force on one side of the bearing, on one side of the reduced portion, [300] with respect to the other side of that same roller. I mean on the other side of the reduced portion, is that correct?

A. Yes, the roll is pinched on one side harder than it is on the other.

Q. Isn't it true that when you expose one side of this roller 12 entirely you remove the outer race, then you do not apply to that side any force at all?

A. All right.

Q. That is correct. So there is a great unbalance when you remove the outer race, you cut it away, than normally, isn't that true?

A. When the roller is in that opening, it is.

(Testimony of M. F. Spotts.)

Q. That is right, and therefore you would require much greater force to correct the skewing than if the outer race was in position?

A. Could I amplify it a little bit without making a speech?

Q. We do not want you to make a speech. We want you to state facts.

A. The direction of the belts is horizontal and the skewing, the load on the pulley then is like this. The pinching takes place approximately at opposite sides of the bearing on a horizontal line through the center. The opening we look at is at the top and bottom. The rollers in there do not have hardly any force on them, so it does not matter whether the opening is there or whether it is not. [301]

Q. You do not mean to say that there is not a substantial difference as to the frictional contact on one side of that roller than on the other side?

A. The friction comes from the force that is applied to the roller and if you do not have any forces on the roller you do not get any friction, and in the top and bottom there are no forces applied to the roller and I would say that the friction is very, very small.

Q. All right, Professor, then why do the rollers rotate on the top and bottom if no friction is applied to them?

A. Oh, they probably get that much to make them turn.

Q. Don't say "get that much". You might as

(Testimony of M. F. Spotts.)

well say that the outer race on one side contacts the roller and rotates it, doesn't it?

A. When it is in the so-called load zone.

Q. It does not rotate in the zones where you cut it away?

A. I don't believe I know that answer.

Q. Well, you saw it rotate. What rotated it?

A. Oh, it was carried bodily around, and whether it was turning at the same time or not I do not know that.

Q. You would not know whether it rotates?

A. Not up in there.

Q. You made tests of this, didn't you, for a long time? A. Oh, yes.

Q. And you still do not know whether it rotates [302] or not at that point where the outer race is cut away? A. That is correct.

Q. Can that be determined?

A. It might if enough energy and money would be spent on the question.

Q. On this model you could not determine whether it rotates or not?

A. I could not tell very well from that model there.

Q. So your visual observation would not be sufficient?

A. We were not so much interested in whether the roller was rotating or not about its own individual axis as we were with other questions.

Q. Which were the other questions?

A. Skewing.

(Testimony of M. F. Spotts.)

Q. In skewing, you had all of your skewing all the time, and it is your theory that those rollers work the same way on the other parts of those bearings in Defendant's Exhibits T-2 and T-3 than at the places where you cut away the outer race, is that your testimony?

A. If I understood you correctly, is the same skew in the opening as it is in the other places of the bearing?

Q. I say they work the same way or not. All right, answer it. Is it the same skewing all around?

A. Yes, it is, approximately or very closely at the same skewing all around. [303]

Q. How do you know?

A. The clearance between the rollers is so very small along the sides, that if one of them is going to tip or cock very much, or as much as we saw, then all of them have to do so.

Q. So that is a theory, but you can't develop a theory of whether or not, if all the rollers rotate and they are close together, whether the rollers opposite the opening of the outer race also rotate or not, and on that you have no theory, is that right?

A. We would not know that. We know they are cocked around and skewed, but whether they are individually rotating or not we do not care very much. We do not know, let us say, and secondly we do not care very much. We do not carry any load on it. It doesn't make any difference.

Q. Are your outer races at that point, at the

(Testimony of M. F. Spotts.)

point where you cut away the outer edge on one side? [304]

A. The place where the race is cut away, of course, they are not contacting.

Q. They are not contacted by the outer race on the other side of the roller opposite from the cut-away portion?

A. I should judge there would be contact there.

Q. If they are contacted and the outer race is rotating and the inner race is stationary, doesn't friction develop? Isn't that a frictional contact?

A. Yes, there would be some friction.

Q. If there is a frictional contact, then one of two things can happen: Either the rollers rotate or the outer race will slip, is that right?

A. It would be one or the two.

Q. No; which happens?

A. It could be either one or the other or part of both.

Q. You studied this matter now for over a year?

A. We have made no determination of what forces, ordinarily small, would be acting upon the rollers in the unloaded portion of the bearing.

Q. What determination did you make on the loaded portion of the bearing?

A. We did not make any determinations there either, except to know that those rollers would have to carry the load of the bearing. We would know that.

Q. Then how did you know that the contact [305] between the shoulder of the roller bearing,

(Testimony of M. F. Spotts.)

the reduced portion, and the side of the guide rail does not develop enough friction to straighten it out?

A. Just can't make enough force to do that.

Q. How do you know? You said you made no determination of forces on this bearing.

A. If the force that you develop when the roller contacts the guide rail would be great enough to straighten out the roller, we must keep in mind that the lack of parallelism between the two races is taking place all the time. That is unchanged while the bearing operates. It is this lack of parallelism that puts this uneven force on the roller that you were just speaking about, and this uneven force on the roller causes it to skew. And if one roller or a few rollers in the load zone skew, then they skew all the way around.

All right. Let us say that the roller, the skewed roller, moves endwise in its rolling until it touches the guide rail. Now, if there would be a force big enough at that point and able to straighten out the rollers, and supposing it did so, then the straightened roller is still subjected to the same set of forces that made it skew in the first place, and it would immediately go back into its skewed position again. And we know that that does not happen.

Q. How do you know that it does not happen?

A. The skewed roller moves endwise until it [306] touches the guide rail. At the same time the moving race moves endwise then. Of course, it is

(Testimony of M. F. Spotts.)

touching the skewed roller and is shifted over to the side.

All right; if the roller goes into a skew, that happens, the race moves over to the side. Now, if the rollers are incidentally straightened out by the effect of the guide rail, then the roller would not stay over to one side as the skewed rollers had thrown it, but would resume its normal position again so that the race would be continuously rubbing back and forth in step with this wiggle that the roller would have. We do not observe——

Q. You are talking now about a moving guide rail or a stationary guide rail?

A. Either one.

Q. You mean the stationary guide rail would wiggle, too?

A. No, the guide rail does not wiggle. It is the roller that wiggles. The skewing and unskewing, or correcting or uncorrecting the skewing.

Q. Which means the skewing wiggles but it isn't the races that wobble, is that right?

A. Yes, if the roller skews and then is corrected, it could be in a continual state of motion, something like this.

Q. That is right.

A. And then the moving race would be in continual motion back and forth, then. [307]

Q. How can the moving race be in continual motion?

A. Oh, when the roller skews and touches the

(Testimony of M. F. Spotts.)

race, that skewed, cocked position of the roller draws the race over to one side.

Q. How can it? Show me on plaintiff's Exhibit 5 how the outer rings there can wobble back and forth.

A. Not only can it not wobble back and forth but you can't touch the shaft.

Q. That is right, but do you know why? Because there is a plain roller bearing in it of the kind of Fig. 6, a plain needle bearing.

A. I presume that it is loaded so heavily in the middle it would have difficulty turning anyhow.

Q. We will conduct an experiment in court. Take out those bearings and put in the bearings 5-A and sort of see how much the plate is bowed here, the tightness, and tighten it up in exactly the same way. Then we will see the difference as to how you can turn it with a straight roller and with one that has guide rail rollers. Please do it. You do not have to take it off completely. Just loosen it enough and you can push those bearings out.

Mr. Mueller: Are the bearings you are going to substitute in evidence, Mr. White?

Mr. White: Yes, 5-A, the same bearings which we had in it before and with which Mr. Stallman demonstrated. And another [308] one of the same kind.

May Mr. Stallman help me? He has stronger hands than I have, your Honor.

(The bearings were withdrawn from Plaintiff's Exhibit No. 5.)

(Testimony of M. F. Spotts.)

Mr. White: Let the record show that with the assistance of Mr. Stallman we have substituted Exhibit 5-A in place of the straight roller bearings on Exhibit 5.

Q. Now, Doctor, tighten it up just as tight as it was before, or as tight as you can. You can tighten it more if you wish.

A. Mr. White, would you permit me to tighten it just as far as we might find it in a commercially acceptable shaft?

Q. It would not be a fair comparison to the roller bearings. Tighten it as tight as was the roller bearing.

A. If you tighten it like it was before, it is so tight it is ridiculous, and no commercial machine would ever operate that way.

Q. You admit in advance that it would not lock? 5-A would not lock?

A. No, I only say if you make it as tight as it was before, it would not be comparable to any commercial device.

Q. Would you say it would lock just like the roller bearings did?

A. A fair comparison would be to try to put in some [309] misalignment here that you might find in a commercial product and then test the two bearings.

Q. Then at this time you do not consider it advantageous to yourself to perform the experiment for the jury by tightening that just as tight as the other one was and then demonstrating that the

(Testimony of M. F. Spotts.)

Stallman type bearing will not lock under the same pressure?

Mr. Mueller: I object to counsel for the plaintiff making a speech to the jury. I believe that is improper conduct.

The Court: Of course, he is like all experts; he wants to argue about it instead of doing it.

The Witness: I would like the record to show, then, I am doing something that I never saw in all my life in engineering.

The Court: It is not a question of whether you saw it or not. There were some bearings in there. They were tightened to a certain extent. There have been some other bearings substituted. All the attorney has asked you to do is to tighten it to the same extent and see what happens. [310]

The Witness: Well, I have tightened it and turned the clip.

Q. You can turn it, can you?

A. Yes, I can turn it. It is difficult but it can still be turned.

Q. Now with that difference——

A. Not a very big difference.

Q. With that difference not a very big difference, why is it that you did not advise Mr. Mueller that these Guiderol bearings ought to be abandoned and they ought to return to the plain old-fashioned needle bearings shown in Fig. 6 of the Stallman patent? Did you advise him that?

A. Did I advise him that?

Q. Yes. A. No, I did not.

(Testimony of M. F. Spotts.)

Q. I would like to draw your attention to these prior patents and these various drawings introduced in evidence. I call your attention to Defendant's Exhibit W on which there is a combination of illustrations of the Heim patent and the Kempster patent. Now did you make that selection of combining those figures about the same way?

A. No, I didn't make the selection.

Q. Do you agree with that selection?

A. I think it is a good representative selection.

Q. Do you think that Kempster and Heim are about the same [311] representation of the prior art?

A. They are not quite the same in proportion, they are not too very exact, but they give a somewhat different coverage of this type of roller bearing.

Q. Then in that case which would you choose as compared with the Stallman patent drawing? Which would you choose as being closer to the Stallman bearing, the Heim or the Kempster?

A. Heim is proportioned in a way that would be closer to Stallman.

Q. Could we agree then that Heim is the closest prior art patent which you testified to?

A. I would hardly—I would have to think that over. There are so many features——

Q. Think it over.

A. There are so many features in these bearings I would hate to say right off.

Q. Well, think it over.

(Testimony of M. F. Spotts.)

A. The differences appear to be only in degree or in proportion, as *as* to structure and function I couldn't see much difference between Heim and Kempster.

Q. Well, could you see in Kempster, for instance, those spacing discs which are between the rollers running on a track?

A. Yes, that ~~is~~ the principal difference in Kempster; these [312] spacing rollers, as you have said.

Q. Are there any such spacing rollers in the Heim patent? A. No, there isn't.

Q. I call your attention to Defendant's Exhibit P—I believe that is the exhibit number of the enlargement of the Zahn patent drawing.

A. Q.

Q. Q. Now you can see the Heim patent drawings right next to it. A. Yes.

Q. And on the other side you can see the Stallman patent drawing. A. Yes.

Q. Which would you say is closest to the Stallman patent drawing, the Heim patent or the Zahn patent drawings as you see them there?

A. The differences that we observe are simply in proportioning or dimensions of the parts. Functionally and structurally the similarity carries right straight through.

Q. Would you say that the Zahn patent structurally is closer to the Stallman patent than the Heim patent?

A. If you consider the two guide ring bearing

(Testimony of M. F. Spotts.)

of the Stallman, I would say that they were close to each other.

Q. Considering Fig. 5; that is the only figure. Now how about Fig. 1, Fig. 2, Fig. 3 and Fig. 4 of the Stallman [313] drawings?

A. They only have one guide rail whereas the Zahn patent has two guide rails on all the other rollers.

Q. Therefore, as to all the other figures, isn't it true that Heim would be a much closer reference than Zahn?

A. As far as that point is concerned.

Q. Well, let's go to the operation of the Zahn patent. Look at Fig. 2. Isn't it true that on Fig. 2 you have a sort of a head at each end of that roller (d), or is it roller (a)?

A. (a).

heads at the end of each roller (a) are outside of the ring on the shaft, is that right?

A. Yes, we have the engagement as you mention it there.

Q. Now do you recall in the Zahn patent that there is some special provision made as to the spacing, relative spacing there in each of the grooves with respect to the opposite sides that connect on the shaft?

A. Yes, he had to take care of that because he had two grooves in his roller.

Q. What is that special provision? You might as well advise the jury that there is some special feature in Zahn that you forgot to mention before.

(Testimony of M. F. Spotts.)

A. He wanted the forward end of the roller to make contact first.

Q. Well, what did he do structurally? Point it out. [314]

A. Then he increased the clearance to increase the clearance on the inner side so that that would take place.

Q. He says it differently, doesn't he? He says that there must be bigger clearance on the inside than on the outside; it must touch on the outside, isn't that right?

A. I believe that is the way he says it.

Q. The way I said it or the way you said it?

A. No, I mean the way you said it I think agrees with Zahn. Perhaps I'd better read it to make sure, but that is my recollection.

Q. My idea merely is that the jury gets a clear picture of everything in that patent, not only what you said before. Look at Fig. 4 of that patent. You spoke about that on direct examination, didn't you—Fig. 4 of the Zahn patent?

A. What did I do?

Q. You spoke about that; you explained it, didn't you?

A. Well, it was mentioned, I am sure, but I don't just recall in what connection.

Q. Did you tell the jury at that time that those heads at the end of each roller (a) are outside of the bearing proper? A. No, I didn't mention that.

Q. But they are outside of the bearing proper, aren't they?

(Testimony of M. F. Spotts.)

A. They do not lie within the low tearing length of roller (a).

Q. And what you call the low tearing frame are the races, [315] isn't that right? They are outside of the races?

A. Yes.

Q. In fact they are guided on separate members which are inserted into the ends of the bearings between the races?

A. Oh, they are attached rigidly to the races; they are not integral.

Q. You are referring now to what point?

A. The guide rail (g) is attached permanently to the shaft (b). The guide rail (g) here is attached permanently to the fixed race (c). They are not integral but they are permanently attached.

Q. Isn't the guide rail (g) in Fig. 4 on a hub (r), I believe is the proper number? Not (r); is that a (p)?

A. (p).

Q. (p)?

A. Yes.

Q. Isn't the guide rail part of that?

A. Yes, it is.

Q. And you can pull out that hub, can't you? You can pull it off the shaft?

A. Yes.

Q. And there is a ball bearing in it?

A. Yes.

Q. There is a ball bearing on each end of that in order to hold the actual Zahn bearing in place; isn't that true? [316]

A. You can see the ball here quite plainly in this Figure 4.

(Testimony of M. F. Spotts.)

Q. In this Figure 4 there is only one ball bearing on one side? A. It looks that way.

Q. On Fig. 2 there are two ball bearings, isn't that true, one on each end? A. Yes, there is.

Q. Is there such a ball bearing required on the end of the Stallman bearing shown on the Stallman patent drawing?

A. The ball bearings here take care of end thrust in the assembly.

Q. That is correct.

A. And there is no provision made for end thrust in the Stallman bearing.

Q. I would like to call your attention again to the Kempster patent. Does your recollection agree with mine, Doctor, that you said you didn't know whether in the Kempster patent the outer race was stationary or rotating?

A. I said that so far as figures 1 and 2 were concerned.

Q. That wouldn't apply to figure 3, is that right?

A. Figure 3 resembles very much the hub of a wheel, and it may be rotating in this case.

Q. Did you read the Kempster patent?

A. Yes, I read it, yes, sir.

Q. Just open it up and it will enlighten you whether it is [317] rotating or not.

A. I presume you mean the first page, second column, line 63?

Q. Yes.

A. To quote: "When the sheaves or wheels are composed wholly of metal, the circular bushing or

(Testimony of M. F. Spotts.)

casing 2 is formed integral therewith as shown in Figure 3."

Q. Well, that is as to Fig. 3. However, as to Fig. 2, I call your attention, to shorten the testimony, to column 1 of the patent—the same patent, column 1, page 1, line 28, which says:

"Figure 1 represents an end view of my invention as applied to a bushing or casing for sheaves, wheels, etc."

Now sheaves and wheels are rotating elements of stationary shafts, are they not?

A. Ordinarily a sheave rotates.

Q. Always a sheave rotates, doesn't it?

A. Nearly always.

Q. When doesn't it rotate?

A. I would have to think, but I can think of one.

Q. Can you now? A. Probably not.

Q. After all, you are a teaching professor; if your students asked you the same question do you have to go to a book to look it up? [318]

A. I might have to look a lot of places, I am sure.

Q. I can tell you that there is no instance where a sheave is stationary.

A. I would be inclined to disagree.

Q. Well, this trial isn't long enough to prove your point.

Doctor, then, as far as you are concerned, Figure 1 was an indication there that the outer race was

(Testimony of M. F. Spotts.)

rotating and the shaft was stationary, isn't that right?

A. I believe that is the intent of the language.

Q. That is the intent of the language?

A. I certainly agree with the words.

Q. And furthermore, wouldn't you be sure as a teacher of machine design that when you see that flange 5 on the end of it with bolts in it, that that would be put on there for the purpose of attaching it to a sheave or wheel? You don't have it in the ordinary bearing where the shaft rotates, do you?

A. Oh, I wouldn't be able to tell that just from looking at flange 5 because on our other drawing here we have an example.

Q. On which drawing do you have an example? You mean that combination drawing? A. Yes.

Q. Where did you take that example from?

A. It is shown in sketch G.

Q. Sketch G on that miscellaneous drawing of Defendant's Exhibit W? [319]

A. Oh, you can make a device like this without reference to any reference work.

Q. Well, did you make that device?

A. No, I did not.

Q. Would you attach normally a bearing like that in a fixed housing as you show in G? Is that your preferred design?

A. I can on the face of this see no objection to doing that.

Q. Is that the recommended, ordinary design to

(Testimony of M. F. Spotts.)

put a bearing in a housing with a flange 5 like that?
Is that what you recommend in your book?

A. I don't recommend it in my book, but I certainly wouldn't hesitate to. There is nothing wrong with it.

Q. Which means that is a theoretical design but not the ordinary way of securing it; is that right?

A. I presume you would find more examples of doing it otherwise.

Q. Well, I will give you this SKF catalogue which has also examples of bearings. Show me one where they have put a bearing in a housing that way.

A. SKF I don't believe makes an outer housing that looks like this.

Q. Who makes an outer housing that looks like that?
A. I don't know of anyone. [320]

Q. Well, that is what I wanted to know. [320-A]

* * * * *

Mr. White: If your Honor please, we are through with the cross-examination.

The Court: Any redirect?

Redirect Examination

Q. (By Mr. Mueller): Dr. Spotts, there is testimony about the shoulder of the recess in a roller engaging in the guide rail, and when there is engagement between the neck of the roller and the guide rail there is friction developed, is that correct?
A. That is correct.

Q. When the roller changes position so that

(Testimony of M. F. Spotts.)

there is no longer engagement between the neck of the roller and the guide rail, then that frictional force is gone; is that correct?

A. You mean if something did cause the roller to change?

Q. That is correct, if something caused the roller to change.

A. And it did not touch any more, then there would not be any friction.

Q. So then at that point, when there is no touching between the roller and the guide rail, then there is no friction to cancel the skewing, is that correct? A. That is so.

Q. So then we are not able to think of that frictional force which is developed when the roller touches the guide rail; we can't think of that as a force that reaches out and moves the roller, is that correct? It is in effect only when there [321] is engagement between the roller and the guide rail?

A. Yes, only while the two bodies are touching each other.

Mr. Mueller: That is all.

The Court: Anything else?

Mr. White: Just one question.

Recross Examination

Q. (By Mr. White): When the shoulder on this reduced portion of the roller does not touch the guide rail at either side, there is no skewing, is there?

A. Oh, the roller might be a little out of mis-

(Testimony of M. F. Spotts.)

alignment but it would not last very long because it runs endwise and comes in contact.

Q. But there is not misalignment for it to turn far enough for the shoulder to touch the guide rail, is that correct?

A. Oh, no, that comes because of the roller moving bodily is an endwise direction.

Q. Let us get down again from the beginning. You said that when the roller is straight, there is no friction between the shoulder of the reduced portion of the roller and the guide rail, is that right?

A. Not straight. I said when they didn't touch.

Q. When they didn't touch? A. Yes, sir.

Q. When they do not touch, that means the roller did not skew far enough to touch, is that right? [322] A. No, that is not quite right.

Q. If it skewed far enough it would touch, wouldn't it?

A. If it would skew far enough you could make it touch.

Q. You do not make it touch because it is in the bearing?

A. Yes, if you did twist it enough, you could twist it enough to make it touch.

Q. Isn't the twist in the bearing enough to touch? A. Not from that cause alone.

Q. Does it or does it not twist enough to touch?

A. Mostly not.

Q. So in your opinion there is no skewing in this bearing, is that right?

(Testimony of M. F. Spotts.)

The Court: No what?

Q. (By Mr. White): No skewing in this bearing. A. Certainly not.

Q. Now, you disagree with what I read out of that SKF report, is that right?

A. The rollers can skew only a slight amount, and the shoulder may not touch the guide rail, but this slight amount of skewing causes that roller to move endwise until it does touch the guide rail. The big model shows that. We showed that yesterday.

Q. What we are talking about is, as shown on the big model, as the roller skews and it moves along, alternately it will touch the guide rail, is that right?

A. Yes, it moves endwise until it does touch the guide rail every time.

Q. I just want to bring out there is practically no skewing at the time and it does not touch, is that right?

A. That depends upon the dimensions of the body. It might be skewed just a little bit. It might be skewed about as much as it possibly could.

Q. I think we could avoid theorizing if we possibly could. If you will look at your own model of Defendant's Exhibit S-1, isn't it true that in this position where the roller is straight——

A. Yes.

Q. ——the shoulder does not touch the side of the guide rail?

A. It might just happen to be over to one side and doesn't touch.

(Testimony of M. F. Spotts.)

Q. Does it touch now? A. No, it does not.

Q. Is that the normal position?

A. The normal position is to have a little bit of skew.

Q. All the time?

A. Nearly all the time. I can conceive of conditions being so perfect where they might run straight, but evidence seems to tell us that ordinarily there is some skew.

Q. And you have no other evidence than what you testified [324] to in this courtroom as to that?

A. That is as far as it goes, but it is very conclusive.

Q. To you; and now all this evidence that you have in the courtroom proves to you that there is always a skewing in these rollers, is that right?

A. Well, we have loads on the bearing which tend to cause the two races to get out from being parallel with each other.

Q. You are again going to another story. Let us go back to this. This roller is straight. Isn't this true, that the bearing is designed for this position, Professor? You can answer that yes or no.

A. Yes.

Q. All right, answer it that way. Isn't it true that the skewing is corrected when this roller gets out of the position for which it was designed, by reason of some forces in the bearing? Is that right?

A. Yes.

Q. As long as the skewing is about this far, as

(Testimony of M. F. Spotts.)

I am skewing now, the shoulder does not touch the sides of the rail, is that correct?

A. It isn't touching now.

Q. When it is skewed far enough, it touches, doesn't it? A. It does.

Q. That is what I asked you in the beginning.

A. There are other ways to make it touch. I don't know [325] which one you are referring to.

Q. I was talking about skewing. After all, you can make it touch with a sledge hammer, can't you? A. Could I show you now what I mean?

Q. No, you can't show me any more. I didn't ask you a question. If your attorney wants to ask you about it, he can ask you further questions.

I am through with the recross examination.

Further Redirect Examination

Q. (By Mr. Mueller): Dr. Spotts, from the standpoint of ordinary machinery in which there are bearings, considering ordinary machines today in which you put roller bearings, isn't it a fact that there is enough misalignment just in the ordinary course of putting together a commercial machine so that there will be skewing between the raceways of a roller bearing in that machine?

A. I would say that is so in the ordinary commercial machine work.

Q. So that in the ordinary machine used in the ordinary course of business today there is sufficient misalignment between the races of roller bearings in that machine such that there will be skewing of the rollers? A. That is so.

(Testimony of M. F. Spotts.)

Mr. Mueller: That is all.

Mr. White: No more cross, your Honor. [326]

The Court: That is all.

* * * * *

Mr. Mueller: There is a stipulation, your Honor, we discussed with reference to the period of negotiations, let [327] us say, and this has been approved by Mr. White. Of course, the papers all went in, you know, and we have some more I was merely holding. They will go into the same exhibit number of the collection that we have, and those have been shown to and discussed with Mr. White.

It is stipulated and agreed between counsel that after the McGill Manufacturing Company letter of June 23rd, 1948, Plaintiff's Exhibit 6, and continuing to the McGill letter of December 6, 1950, Plaintiff's Exhibit 8, and on into 1951 there was a continuing exchange of correspondence and a series of conferences between Stallman and McGill Manufacturing Company officials and their attorneys about the arrangements between them and exploring the possibilities of a new arrangement. The old arrangement was terminated without there ever having been an agreement to a new arrangement.

The conferences and correspondence were discontinued and the old arrangement was terminated upon the advice of McGill Manufacturing Company counsel that Stallman patent 2334227 was in his opinion invalid, and Mr. Stallman was advised of that fact and furnished copies of the opinion of counsel.

The Court: Is that satisfactory, Mr. White?

Mr. White: Yes, your Honor.

The Court: Very well. You have other documents that go into that exhibit number? [328]

Mr. Mueller: Yes.

The Court: Exhibit H—is that the one?

Mr. Mueller: I think it is. We stopped everything when you raised the question. Supposing we wait until the conclusion?

The Court: You can arrange that.

Mr. Mueller: Yes, we can. In fact, we have arranged it.

The Court: Is there anything else you want to clear up on the record?

Mr. Mueller: We have nothing.

The Court: Then the defendant rests.

Mr. Mueller: The defendant rests.

The Court: Do you want to have some rebuttal?

Mr. White: Just a few questions of Mr. Stallman.

The Court: All right.

RALPH STALLMAN

the plaintiff herein, recalled in rebuttal; previously sworn.

Direct Examination

Q. (By Mr. White): Mr. Stallman, did you have any experience with applications of users of the type of bearing described in your patent where the outer race was rotated? A. Yes.

Q. This only customer that was left to you, this

(Testimony of Ralph F. Stallman.)

California Press Manufacturing Company, what kind of bearings do they [329] use?

A. We make a bearing for them on a stationary shaft on which we always put the rail on the stationary shaft. We have made that bearing——

Q. And the outside race rotates, is that right?

A. Yes. They make their own outer race and the rail and the rollers are on the shaft. We have made that bearing for eight years; we have made thousands of them and they are all over the world.

Q. Which means in that case you shifted the guide rail from the outer race to the shaft because the outer race was rotating; is that right?

A. That's right; put it on the stationary race.

Q. Why did you change that way?

A. Well, we knew enough of this development that that was necessary for satisfactory performance, and our results have been that our failures are less than one fourth of one per cent over eight years.

Q. And what was your previous experience with installations where the outer race was rotating?

A. The experiences that we had formerly were with other bearings.

Q. With what kind of bearings?

A. Well, those bearings happen to be made by the R.B.C. Company. That is before I manufactured my own bearings. [330]

Q. Were they bearings in accordance with your patent? A. No.

Q. Did you have any experience with bearings of

(Testimony of Ralph F. Stallman.)

the kind shown in the patents where they were installed in places where the outer race rotated and the guide rail was in the outer race?

A. Yes, we had early tests that discouraged us on the use of that right away.

Q. With whom?

A. Early tests; our own laboratory tests that showed smearing and wearing on the inner races.

Q. Did you have any installation of any kind?

A. No.

Q. No commercial installation?

A. No, sir.

Q. Was there a McGill bearing installed that way anywhere?

A. Yes, we used the former McGill installed on a shaft before we were there. However, I did not sell the McGill.

Q. But there was no other place where this was installed to your knowledge, the McGill bearing, where the outer race rotated?

A. The California Press Company before I was there had the McGill bearing——

Q. Where the outer race rotated and where the rail was in the outer race? [331]

A. This was the former McGill bearing before they—the McGill bearing that they used formerly was the old style bearing.

Q. Well, how about this Enterprise installation, Enterprise Engines?

A. Well, the Enterprise Engines was a wartime

(Testimony of Ralph F. Stallman.)

installation; that was on heavy 1200 horsepower diesel engines for the Navy, and up until four years ago when we lost the—when we discontinued the records of it, they had been substantially all taken off and replaced with another bearing.

Q. Why?

A. Because it was outer race rotation with the guide rail and the moving race.

Q. Well, is that the sole reason? Did it work or didn't it work?

A. It didn't work. It worked for a short period of time but was never satisfactory.

Q. Did you have any experience with American Can Company?

A. Yes, the American Can Company has built a substantial number of closing machines in which we have 36 bearings in each machine, eight of which are operating without a race rotation. Now to date we have had about seven failures of the rollers without a race rotation but no failures of the other bearings at all.

Q. I show you this blueprint, Defendant's Exhibit K, and ask [332] you to examine the particular bearing installation. Now that is where the outer race rotates. You heard Mr. Hoffman testify to that—that is the Hillman-Kelley Company installation?

A. This blueprint seems to show three bearings on a pin.

Q. You heard Mr. Hoffman testify that that worked satisfactorily although the outer race rotates and the guide ring is in the outer race?

(Testimony of Ralph F. Stallman.)

A. Yes.

Q. Why would it work when it doesn't work in the other installation?

A. Well, he has got three bearings here, two to help one.

Q. Which means instead of one bearing he has three bearings backing up one another?

A. If this were properly applied he could have gotten by with one bearing but he has used three.

Q. I show you the other Hillman-Kelley blueprint over here, Defendant's Exhibit L, and I ask you to analyze that installation. That is another one which supposedly works successfully with the outer race rotation with the guide rail on the outer race.

A. Well, mechanically this is a very freak application. I can see that it might work but I imagine its life would be very short.

Q. Explain what made you say it is a freak application. [333] The jury doesn't know what you are referring to.

A. Well, in this they have a rather wide faced gear running on a shaft, the outer race rotates and the one half of the bearing is under the center of that gear. One half of the bearing is taking the load. The other half——

Q. Point it out to the jury. Hold up that print and point out where the center line of rotation is.

A. In looking over this drawing it would appear that that gear is symmetrically mounted and the load should come through the center. However, there is a big space around this side and they have

(Testimony of Ralph F. Stallman.)

moved the bearing to one side so that only one half of the bearing is carrying the load.

Q. Is that the usual condition in the mounting of bearings?

A. No. I can't understand why they would do that. That is very unusual.

Q. How many years of practical experience did you have on bearings exclusively?

A. How many years have I had? Over 25.

Q. All in bearings? A. Yes.

Q. With whom was your first job?

A. SKF Industries.

Q. What was your job with them?

A. What is that? [334]

Q. What was your job with them?

A. I was the West Coast industrial engineer on the installations along the West Coast up to Oregon and Washington.

Q. I will show you here Defendant's Exhibit M which is another installation for R.P.B. Corporation, and I ask you to explain that. That is another installation where the outside race rotates with the guide rail in the outside race and allegedly, according to Mr. Hoffman, it works without complaint from the customer.

A. Obviously that would be all right. That is a crane wheel in which it would probably not accumulate not more than two dozen turns a day in an eight hour day.

Q. That is not the everyday application of this kind of roller bearing?

(Testimony of Ralph F. Stallman.)

A. It is an application where any bearing should last a lifetime, 25 to 30 years. In other words, it is only a crane wheel where a crane would run back and forth the length of this room, for instance, maybe three or four trips a day. That is not what we call a hard application.

Mr. White: That is all.

Cross Examination

Q. (By Mr. Mueller): Mr. Stallman, have you ever seen the Hillman-Kelley machine illustrated in parts in the drawings that you identified? Have you ever seen the actual machine?

A. No, I haven't. [335]

Q. And you do not know, from actual observation of the Hillman-Kelley machine, anything about the operating conditions of that machine?

A. This tells me all I want——

Q. Please answer yes or no.

A. No, I have never seen the machine.

Q. Have you ever worked for the Heim Bearing Company, Mr. Stallman? A. No.

Q. Have you ever been connected with the Heim Bearing Company?

A. I have had the Heim Bearing Company manufacture one of my rod end bearings, yes.

Q. Then you were connected with them for a period of time?

A. I was connected with them; they manufactured the bearings for me.

Q. Have you ever seen the installation of a ma-

(Testimony of Ralph F. Stallman.)

chine such as that illustrated in the drawings of the R.P.B. Corporation—that particular machine?

A. Where is R.P.B.? On this drawing that has the——

Q. No; I say have you ever seen a machine such as that?

A. No, I have never seen anything built by this company.

Mr. Mueller: That is all.

Mr. White: That is all, your Honor.

The Court: That is all, sir. [336]

Mr. White: The plaintiff rests. [337]

* * * * *

Mr. White: The agreement as it now stands is that the total amount of money involved in the case is—you have to add these two amounts—is \$11,927.81 plus \$24,917.37, which is the amount from 1950 to the beginning of the suit.

The Court: \$36,835.18? [338]

* * * * *

Mr. Mueller: As to the second motion, your Honor, the defendant moves for a directed verdict upon the following ground: that each of the claims put in issue by plaintiff, namely, claims 3, 4, 5 and 9 of Stallman patent 2,334,227 is anticipated by prior art patents to Kempster 585,580, to Zahn in British patent 17841 of 1906, which were not cited by the Patent Office during the prosecution of the Stallman application, and further by the patent to Heim, 1885914, and to Rydbeck, 1979707, which was

cited by the Patent Office [359] and that the claims are therefore invalid.

No. 2. That if there are any differences in construction and mode of operation of a device embodying the alleged Stallman invention and the prior art bearings, the construction and function of which is taught by the said prior art patent to Kempster, Zahn British, Heim and Rydbeck as aforesaid, those differences relate solely to matters of dimension and degree such as would be apparent to any person skilled in the art, and hence such claims do not cover anything which would rise to the dignity of invention.

No. 3 ground. In so far as the claims in issue purport to define a new combination of elements substantially identical, a combination of elements functioning in substantially the same manner and for the same purpose, is disclosed in aforesaid named prior art patents, and hence the said claims are invalid for want of invention.

No. 4. Plaintiff failed to sustain his burden of proof by showing that defendants have sold bearings coming within the scope of any valid claim of the letters patent in suit.

I so move. [360]

* * * * *

The Court: Under those circumstances I think I shall deny the motion for a directed verdict.

Gentlemen, I have told you generally what the instructions would be on the question of validity. I will give very simple instructions on the question of

infringement, too, very much following what was stated in the Fish Eviscerator case. [372]

* * * * *

Afternoon Session, April 23, 1956

1:30 P.M.

Instructions to the Jury

The Court: Members of the jury: I told you when you were impaneled that you were going to be called upon to sit in judgment in a kind of case that ordinarily juries don't decide. However, this is not too complicated a case and I think that the counsel on both sides have attempted to, and I think perhaps have succeeded in simplifying the issue for you somewhat.

You have, as the jurors in the case, the function of deciding any question of fact that arises in a civil case such as this and that is exclusively your function. I take no part in that as the judge in the case.

During the course of the trial of this case, as the judge, I made some comments in ruling on evidence and made some inquiries myself of witnesses, but the purpose of those procedures on my part was to perform the duties that a judge has to supervise the trial of the case and to expedite it and to elucidate matters that may be somewhat obscure. But you are not to infer from anything I may have said in that regard, or by virtue of any of the inquiries that I made, that I was intending to indicate to you what your decision is to be, because the purpose of those inquiries, as I have already stated, was sim-

ply to perform the duties that a judge [434] has in general to supervise the trial of a case.

Likewise, while it is your function exclusively to decide the question of fact, there is vested in the judge the exclusive function of telling the jury about the applicable law, and in that field the judge is supreme, just as you are in the field of determining what the truth in fact of the matter is. You have to assume, rightfully or wrongly, that the judge knows what he is talking about when he tells you what the law is and you have to apply the law the way he gives it to you. ^

I say that to you because it sometimes happens that some jurors do come into the jury box from the outside world, as it were, with some preconceived notions on political or economic or social theories and then they proceed to decide the case according to what they think is the proper principle upon which a case should be decided. That is a wrong procedure and we don't permit in the courts, and in fact, if it were permitted, then no person's life, liberty or property would be safe. So it is that we have laid down the rule that you must be guided by what the judge tells you is the law in the case.

It is true that we have somewhat different functions to perform, but nevertheless we do act as a team because we both have the same objective, and that is to see that as near as may be, we can accomplish justice in a particular case.

I have told you that this is a civil case. And in a [435] civil case, the plaintiff—that is, the party who brings the suit—has the burden of proof and he

must prove what he has charged by a preponderance of the evidence.

I might interpolate to say that what I have to say to you today is going to be said quite colloquially. I don't believe in reading written, formal instructions to juries and to fill your ears with a lot of erudite statements that other judges have made or that are found in the books, because it is too much to expect that those who come in from the outside to perform jury duties to understand these intricate principles of law about which the lawyers and the judges from time immemorial have been unable to agree themselves. So it is I will just tell you very simply that my views as to this case are as to the law.

I just started to say to you that the plaintiff has the burden of proving his case by a preponderance of the evidence. And that means that the evidence which he produces, when weighed against opposing evidence, has greater weight and more convincing effect. That doesn't mean that one side or the other has to have more witnesses than the other; it merely means that the quality of the testimony has to preponderate in favor of the plaintiff before the plaintiff can win this case. It is the quality and not the number of witnesses that determines that.

We have some general rules that apply in all civil cases [436] and they apply here, too. I will just give you a few of them very simply.

You have had witnesses testify before you. In every case we start out with the presumption that when a witness comes and sits in this witness chair

that he is going to tell the truth to you. However, that presumption may be rebutted or negated by the manner in which the witness testifies, by his demeanor on the witness stand, his manner on the witness stand, or whether he contradicts himself or whether he is contradicted by the testimony of other witnesses, and by his interest in the case, whether he has an interest in one side or the other. Those are the factors that you take into account in determining whether or not when the witness leaves the stand he still is clothed with that presumption that he was going to tell the truth when he took the stand.

If you should conclude that any witness has testified falsely in any material respect, then you are justified in disregarding all the testimony of a witness. You should, however, not take that drastic step unless it appears to you that the witness has testified in a very material respect.

You are not to determine the case on the basis of or as a result of the influence upon you of any sympathetic considerations you may have or any prejudice you may have.

This being a patent case makes it no different so far as the burden of the plaintiff may have in the case of proving [437] his case by a preponderance of the evidence.

The lawyers have argued the case to you. That is their right, and indeed, it is their duty. However, if they have stated differently the evidence in their arguments, as you call it as having been given by the witnesses, disregard the statements of the evi-

dence as made by the attorneys and only give consideration to the evidence as you recall it as having been given by the witnesses.

In this case there is involved the question of whether or not the plaintiff has a valid patent; secondly, if he has a valid patent, whether the defendant infringed upon what he claimed in his patent; and then, thirdly, if you conclude that the plaintiff has a valid patent and that it is infringed by the defendant, then how much damages he is entitled to receive.

As patent cases go, and I have heard quite a few of them, this is a comparatively simple one, although it may appear to you to have complexity to it because of the variety of the devices that counsel on each side have availed themselves of in order to explain and urge the correctness of their respective sides of the case.

The plaintiff filed in the United States Patent Office on August 9, 1941 his claim for a patent, and the Patent Office granted that patent to him on November 16, 1943.

He made a number of claims in his patent. The claims, as they are spoken of by the lawyers, mean the things that [438] he said that entitle him to the benefit of a patent. Sometimes a large number of these claims are made in patents in order, I take it, to be sure that the claimant feels that he has covered the entire ground with respect to the invention which he claims.

In this case, however, there are four claims in the patent that are relied upon: claims 3, 4, 5 and 9,

and those are the only four claims that you need give consideration to in determining the issue of validity in this case. And in your verdict, if you decide in favor of the plaintiff and that the defendant has infringed, you will be required to indicate in the verdict, as I will subsequently point out to you, the particular claim or claims that you believe are valid and have been infringed if you come to that conclusion.

The first thing that you will want to know, the first thing that will enter your mind, since this is a patent case, is what is a patent. What is it that we are talking about, that the lawyers have argued to you about?

Well, I say to you colloquially that a patent is a right or privilege which the United States grants in accordance with the provisions of the Constitution of the United States to a private person. This right or privilege of grant that we call a patent gives the person to whom it is granted the right to exclude all other persons from the manufacture or sale or use of the particular device covered by the particular [439] invention for a period of 17 years. The grantee gets that exclusively for himself. It is a monopoly that he gets, that the state or country grants him, and he gives in return for it this: He discloses to the world, by virtue of having filed this patent, what his claimed invention is. And it is good for 17 years.

In order that one of these patents may be granted by the Patent Office of the United States—and the Patent Office is the agency through which the gov-

ernment acts in passing upon these patents—it must appear from these claims that are set forth in the patent that the patentee has discovered something that has originality and novelty over and beyond what has theretofore been discovered and recorded in the Patent Office, which the lawyers have spoken of and called the prior art.

The particular patent that is involved in this case is what is commonly described as a combination patent. The plaintiff here has asserted in his claims an arrangement or combination of various elements which he says is something new in that it is an improvement over that which has gone before in that particular field. He doesn't claim that he invented any of these various elements that go to make up the combination, but that the arrangement that he has made of them and in the particular form that he sets forth in his complaint accomplishes a purpose beyond that which has theretofore been accomplished and is an improvement of a substantial [440] nature over that which has gone before.

An applicant for a patent can not get a patent merely because he aggregates or puts together elements that have already been discovered. He must produce, as a result of his aggregation or bringing together of these elements, a combination which the law says entitles him to a patent because of the novelty and the improvement over the prior art which that particular aggregation of the so-called older elements produces.

To illustrate that to you: What is involved in this case, as the lawyers have told you, is something that

involves roller bearings. We have all heard the expression ball bearings probably more frequently, but these are rollers rather than balls.

The plaintiff in this case does not claim that the roller is something new; that the slot in the roller is something new; that the track upon which this proceeds in the rolling operation is something new, or that it operates between an outer and an inner surface which the lawyers have called races—none of those things he claims is new.

As I understand the contentions of the parties in this case, the principal contention of the plaintiff as to the originality of the claims of the patent is that this track on which the roller operates is fixed—the track is fixed to it and it remains immovable, whereas the other container, the [441] inner container, may be movable. The chief claim that he makes is the rigidity or firmness of this outside container in which the roller bearing rolls over a fixed sort of a track.

The other side contends that that is not a novelty and that it is disclosed in these other patents that have been referred to.

So the principal direction that your efforts, in my opinion, should take in this case is that you should consider what the records and the testimony show in this case and determine whether or not this claim of the plaintiff in that regard is something that is new and novel. And in determining that, devoting your efforts to that consideration, you should bear in mind that the test as to invention or novelty as laid down by our courts is this: that if that

which has been developed or claimed to have been invented goes beyond what the ordinary artisan skilled in that particular field of mechanics could do, then it amounts to invention, and if it is not something more than the ordinary artisan or skilled—person skilled in that particular work would produce as a result of his general knowledge—if it is not something more than that, then it is not invention.

There is another matter that has been referred to by counsel which I will now tell you about. There is, because of the issuance by the United States Patent Office a presumption that the patent is valid, and if we were to stop the case at [442] the point where the patent was introduced, that presumption of validity would be enough to establish the plaintiff's case. But the other side may go forward, as they have in this case, and produce evidence in support of their contention that the patent is invalid; that the Patent Office made an error; that they did not give proper consideration to the prior art patents, and that an examination of these discloses that there was in fact and in truth not invention. And the question, then, is whether or not that evidence overcomes the presumption that you start out with that the patent is valid because the Patent Office issued it.

If you determine from the evidence that you have heard here, after considering the presumption of validity that attaches to the patent and the evidence offered against it, that the plaintiff has a valid patent, then the next question you would have to deter-

mine would be whether or not the defendant has infringed the patent of the plaintiff—that is, the claims of the plaintiff's patent.

Infringement means whether or not the defendant has constructed a device which appropriated for the defendant the essential elements of the plaintiff's patent.

In order that infringement be established, it must appear that the defendant has appropriated all of the elements of the claims that the plaintiff has set forth in his patent. If the evidence shows in this case preponderantly that the device [443] which the defendant distributes accomplishes substantially the same results by substantially the same means as that which is disclosed in the claims of the plaintiff's patent, then it would appear that there has been infringement.

In considering the question of infringement, you should look at substance and not form. You should look at those things which are the substance of the device and not be confused by matters of form. Any insubstantial change is not a defense as against infringement if in substance the defendant has appropriated the claims of the plaintiff's patent.

The first subject I would suggest in your consideration of this case is to consider the question of whether or not on the evidence and the facts and in accordance with such instructions as I have given you the plaintiff's patent is valid or not. If you conclude that the plaintiff's patent is invalid, that will end your consideration of the case and you will bring in a verdict then for the defendant. If you de-

cide that the claims set forth in the plaintiff's patent are valid, then you will next consider the question of infringement. And if you decide that the defendant has infringed the claims of the plaintiff's patent, then the next step for you to take is to determine what damage, if any, plaintiff is entitled to.

In this case the plaintiff is not a manufacturer, so [444] the basis of any damages that he can recover in the event that you find his patent is valid and infringed is by way of a royalty for the unauthorized use of his patent.

In this case it has been stipulated that the sum of \$36,835.18 is the total amount which these Guiderol bearings have been sold at by the defendant in this case. So that in order to determine what the damage of the plaintiff is, you will have to fix a percentage of that \$36,835.18 as a royalty, and whatever percentage should be fixed in that regard should be reasonable.

I will say to you that, in my opinion, there is a paucity of evidence in this case on the subject of royalty, although there is some evidence in the case that on sales made during the period of time when the plaintiff was receiving royalties from the manufacturer the amount was ten per cent; that that amount was paid. I would suggest to you, therefore, that you won't go too far wrong if you use that as a basis for determining the royalty percentage involved if you reach a verdict in favor of the plaintiff. You are not bound by my suggestion in that regard; you can come to your own conclusion. Whatever you think the evidence reasonably dis-

closes on the question of what would be a reasonable royalty under the circumstances, you could use in determining the amount of any royalty to be paid.

I think, members of the jury, that this is about as much [445] help as I can give to you on the question of the law. I could talk to you for a long time on the subject of patents. These lawyers and others like them have written volumes on the subject and judges have written volumes on the subject. But I think that if I would say more it would only be confusing and not be enlightening.

If you can conscientiously do so, you are expected to agree upon a verdict in the case. Each side is entitled to the independent judgment of each one of you. When you go out to deliberate, you should freely consult with one another and exchange your views. If after an exchange of views, you have doubts about your own conclusion in the matter, you should not be stubborn, you should not hesitate to abandon your own view. On the other hand, if after a full exchange of ideas, you believe that the view that you have expressed is correct, and in your conscience you feel it to be correct, you should have no hesitancy in adhering to it.

Whenever all of you agree to a verdict, it is the verdict of the jury. In the federal court we require a unanimous verdict. So therefore you should not return to the courtroom from the jury room with a verdict unless in the jury room all of you have agreed to it.

When you have retired to deliberate you will select one of your number as foreman or forelady, as

the case may be, and he or she will preside over your deliberations, will [446] represent you in the further conduct of this case here and will sign your verdict for you when it has been reached.

We have prepared for your consideration two forms of verdict. One form of verdict reads:

“We, the jury, find in favor of the defendant.” You will use that form of verdict if you decide in favor of the defendant and hold the plaintiff’s patent to be invalid, or if you should happen to hold that the plaintiff’s patent is valid but not infringed, when you come to a decision in favor of the defendant, then that would be the form of verdict you would use and that form of verdict would be your verdict.

In the event that you decide in favor of the plaintiff, then you would use this form of verdict which reads:

“We, the jury, find in favor of the plaintiff and determine that the Stallman patent No. 2,334,227 is valid and infringed by the defendant as to claims No.”——

then you will put in there in that blank space whether you consider that all four claims, 3, 4, 5 and 9 were infringed or only one or a lesser number were infringed. And then the form of verdict goes on to read further:

“We find damages against the defendant, Casey Bearing Company, in the sum of Blank Dollars, which is Blank per cent of \$36,835.18, the total price of Guiderol bearings which have

been stipulated to have been sold by the defendant." [447]

And you will put in the blank space the percentage of royalty that you feel is proper in the case and multiply the total amount of \$36,000 by the percentage and then fill in in the other blank space the royalty that you get as a result of that, and then your foreman will sign that form of verdict for you and it will be your verdict.

When you see the form of this verdict outside in the jury room, you perhaps will understand when you have it before you a little more clearly than my explanation of it, because I am holding it in my hand and you are at a distance and you are not able to follow it in front of you.

After you have retired to the jury room and have organized and elected a foreman, if you wish to see all or any of the exhibits or documents that have been admitted in evidence in the case, you will notify the bailiff and I will see that they are sent to you.

Does either side have any corrections or objections?

Mr. Mueller: No, Your Honor.

Mr. White: No, Your Honor.

The Court: Very well. Since there are no objections to the instructions, the jury may retire.

(Thereupon the jury retired at 2:05 o'clock p.m., and returned into court at 4:30 o'clock p.m., at which time the following proceedings were had:) [448]

The Court: Mr. Foreman, has the jury reached a verdict?

The Foreman: Yes, Your Honor.

The Court: Would you hand the verdict to the marshal, please?

Will you read the verdict?

The Clerk: Ladies and gentlemen of the jury: Hearken to your verdict as it will stand recorded:

“We, the jury, find in favor of the plaintiff and determine that the Stallman patent No. 2,334,227 is valid and infringed by the defendant as to claims Nos. 3, 4, 5 and 9.

“We find damages against the defendant Casey Bearing Company, Inc., et al., in the sum of \$3,683.51 which is ten per cent of \$36,835.18, the total price of the Guiderol bearings which have been stipulated to have been sold by the said defendant. Frank A. Webster, Jr., Foreman.”

Is the verdict as read the unanimous verdict of all the jurors in the jury box?

The Jurors: It is. It is.

The Court: Do you wish the jury polled, counsel?

Mr. Mueller: Yes, if it please Your Honor.

The Court: Poll the jury.

(The Clerk thereupon polled the jury [449] and all the jurors responded in the affirmative that it was their verdict.)

The Court: Twelve jurors having answered in the affirmative that the verdict as read by the Clerk

is the unanimous verdict of the jury, the Clerk may record the verdict.

The Clerk: Yes, Your Honor.

The Court: Members of the jury, the Court wishes to thank you for the attention and consideration that you have given this somewhat new case for you as jurors. You probably will have some further service in this court during the period for which you were impaneled. When that will be I don't know, but whenever it does come you will get the sad news from the United States marshal.

The jurors may be excused.

(Thereupon the jurors retired from the courtroom and the following proceedings were had.)

* * * * *

[Endorsed]: Filed October 11, 1956.

[Endorsed]: No. 15328. United States Court of Appeals for the Ninth Circuit. Ralph F. Stallman, Appellant, vs. Casey Bearing Company, Inc., a corporation, and T. W. Crosby, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 16, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

Case No. 15328

RALPH F. STALLMAN

Appellant,

vs.

CASEY BEARING COMPANY, INC., a corpora-
tion; and T. W. CROSBY, Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY

Appellant herewith makes the following state-
ment of points on which he intends to rely in this
appeal:

1. The Trial Court erred in overruling the jury's
verdict that the differences between the subject mat-
ter of the claims of the patent in suit and the prior
art are such that the subject matter as a whole
would not have been obvious at the time the inven-
tion was made to a person having ordinary skill in
the art to which such matters pertain.

2. The Trial Court erred in considering the com-
parison of prior patents with the claims in suit
of plaintiff's patent as a question of law, although
the same comparison is a question of fact on which
the jury's verdict is final.

3. The Trial Court erred in disregarding that
there is evidence of sufficient substantiality to sup-

port a verdict in favor of plaintiff, and in disregarding the rule of law that the jury's verdict is final on questions of fact and that conflicting evidence is for the jury and not for the Court on motion for directed verdict or for judgment notwithstanding the verdict.

4. The Trial Court erred in holding that the only reasonable conclusion that can be drawn from the comparison of the prior art with the teaching of plaintiff's patent is that the patent is invalid.

5. The Trial Court erred in its ruling that plaintiff's contribution to the art did not advance the frontiers of science in the narrow field of bearings so as to satisfy the exacting standards of our patent system.

6. The Trial Court erred in ruling as a matter of law that the claims of the patent in suit are invalid.

7. The Trial Court erred in setting aside the verdict of the jury and entering judgment in favor of defendant.

Dated: October 19th, 1956.

GEORGE B. WHITE

ALBERT D. ELLEDGE

/s/ By GEORGE B. WHITE

Attorneys for Appellant

Certificate of Mailing Attached.

[Endorsed]: Filed October 19, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Plaintiff-appellant hereby designates the following in the case to be contained in the record of appeal:

Complaint;

Answer of Casey Bearing Company, Inc., and T. W. Crosby to Complaint;

Notice by Defendant of Additional Prior Art to Be Relied Upon at Trial;

Verdict;

Judgment on Verdict;

Motion of Defendant for Judgment Notwithstanding Verdict and Motion for a New Trial;

Opinion of Court on Motion for Judgment Notwithstanding Verdict;

Judgment;

Notice of Appeal;

Appeal Bond;

This Designation of Record on Appeal.

The following parts of the Reporter's Transcript of proceedings April 18, 19, 20 and 23, 1956:

* * * * *

The following Exhibits in Book of Exhibits:

Exhibit 1—Stallman U. S. Patent No. 2,334,227.

Out of Ex. O—British Zahn Patent No. 17841;

Out of Ex. O—Kempster U. S. Patent No. 585,580;

Out of Ex. P—Rydbeck U. S. Patent No. 1,979,707;

Out of Ex. P—Heim U. S. Patent No. 1,885,914;

Out of Ex. P—Kempster U. S. Patent No. 747,324;

(Appellant will furnish copies of the above Exhibits to be included in such Book of Exhibits).

All the remaining Exhibits in this case to be considered in their original form and not to be printed.

GEORGE B. WHITE

ALBERT D. ELLEDGE

/s/ By GEORGE B. WHITE

Attorneys for Appellant

Certificate of Mailing Attached.

[Endorsed]: Filed October 19, 1956. Paul P. O'Brien, Clerk.

No. 15,328

**United States Court of Appeals
For the Ninth Circuit**

RALPH F. STALLMAN,

Appellant,

VS.

CASEY BEARING COMPANY, INC., a corporation, and T. W. CROSBY,

Appellees.

APPELLANT'S OPENING BRIEF.

GEORGE B. WHITE,

1095 Market Street, San Francisco 3, California,

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Attorneys for Appellant.

FILED

FEB 28 1957

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No. 15,328

**United States Court of Appeals
For the Ninth Circuit**

RALPH F. STALLMAN,

Appellant,

VS.

CASEY BEARING COMPANY, INC., a corporation, and T. W. CROSBY,

Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Appellant's action for patent infringement arises under Title 35, Section 271, United States Code. It is an action on the case for damages for patent infringement.

Jurisdiction of the District Court is authorized by Title 28 United States Code, Section 1338.

The jurisdiction of this Honorable Court to review the judgment rendered in the United States District Court is found in Title 28 United States Code, Section 1291.

ABSTRACT OF THE CASE.

This appeal is prosecuted after adverse judgment rendered by the trial Court (Vol. I, pp. 34, 35).

The jury rendered a verdict holding claims 3, 4, 5 and 9 of the patent in suit valid and infringed (Vol. I, p. 13). Defendant moved pursuant to rule 50 (b) of the Rules of Civil Procedure for judgment notwithstanding the verdict (Vol. I, p. 15). The Court granted defendant's said motion (Vol. I, pp. 27-35).

The sole question raised by this appeal goes to the propriety of the trial Court's granting defendant's motion for judgment as a matter of law.

In its opinion (Vol. I, p. 27) the trial Court directed judgment for defendant notwithstanding the verdict, stating:

"Thus, solely from the comparison of the prior art with the teaching of plaintiff's patent, without weighing the testimony of any witnesses, expert or otherwise, the only reasonable conclusion that can be drawn is that the patent is invalid."

It is appellant's duty to point out that the "comparison of the prior art" with the teaching of plaintiff's patent in disregard of the testimony herein led the trial Court to mistaken interpretation of the showing of the prior art, and that a fair consideration and comparison of the patent in suit and the prior art will show that the structure of the patent in suit performs a new and unobvious function and result, and that invalidity was not "the only reason-

able conclusion'' that could be drawn, and further that there was sufficient evidence to raise a question of fact as to the comparison of the prior art and the patent in suit and as to whether the subject matter of the claims of the patent in suit as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains (Title 35, Section 103, United States Code).

FACTUAL STATEMENT.

Ralph F. Stallman, appellant-plaintiff, had over twenty five years practical experience on bearings exclusively. He was employed at one time by SKF Industries, one of the biggest ball and roller bearing manufacturers (Vol. I, page 261).

Roller bearings in general connect a pair of relatively rotating parts. For instance when a shaft rotates in a stationary support, a bearing in the support surrounds the shaft so as to reduce friction during the rotation of the shaft. Such roller bearing usually has an outer race held stationary in the support and an inner race on the circumference of the shaft. The rollers rotate between said races generally parallel with the shaft. In other applications the shaft is stationary and the outer race rotates e. g. with a pulley.

Among other bearings with which Stallman was concerned during his activities as a bearing engineer and salesman was the so-called needle bearing in

which the rollers are relatively long and narrow (Vol. II, p. 286, Fig. 6). Excessive friction due to misalignment of such rollers had been a problem in the bearing industry for many years and various attempts were made to obviate this evil (Vol. I, pp. 172, 173, 185, 186, 188).

Sometime in 1941 Stallman invented the solution for this long vexing problem by providing a guide ring or rail on the stationary race of the bearing, and providing each roller with a reduced portion and groove adapted to ride on the stationary ring or rail. The groove or reduced portion of the Stallman roller is wider than the ring or rail so as to leave a space to permit skewing of the roller when subjected to unbalanced forces (Vol. I, p. 214). Thus the roller instead of resisting such unbalancing forces on the bearing and producing increased friction, yields to such unbalance and the loaded side of the roller advances faster than the other side until the shoulder of the reduced portion or groove of this advanced side strikes the stationary guide ring or rail and is held back by the ring or rail until the other side of the roller catches up, and thus correct the skewing. This action is a continuously repeated self-correction of the rollers and prevents the locking of such bearings as a result of excessive skewing (Vol. I. pp. 46-60, 86, 87, 97).

Stallman showed his novel bearings made in accordance with his Patent No. 2,334,227 (Vol. II, p. 286), to Crosby, the president of defendant corporation, and upon Crosby's recommendation Stallman

approached McGill Manufacturing Company (Vol. I, pp. 60, 61). This resulted in a 10% royalty agreement with McGill Manufacturing Company under the Stallman patent in 1948 (Vol. I, p. 62).

Stallman turned over about thirty of his own customers to McGill Manufacturing Co. and to Defendant Casey Bearing Company, the California distributor for McGill (Vol. I, p. 68). The Stallman bearing was and is a success (Vol. I, pp. 62, 64, 65, 115). But in 1950 after some negotiations, upon the advice of McGill's patent counsel that the Stallman patent was invalid, the agreement with Stallman was terminated (Vol. I, p. 255).

After the termination of the agreement, however, McGill and Defendant Casey Bearing Company did not abandon the Stallman bearing, but only removed the patent number which theretofore appeared on the bearings and drawings (Vol. I, p. 62), and continued the manufacture and sale of Stallman bearings to date with increasing success (Vol. I, p. 115). This left Stallman with one customer (Vol. I, p. 71). Stallman served notice of infringement on McGill and on Defendant Casey Bearing Company, but without avail and this suit followed. The defendant Casey Bearing Co. now sells in California alone thousands of such bearings each month (Vol. I, p. 115).

THE INVENTION.

The Stallman patent is simple and is well defined for instance in Claim 5 of the patent.

A bearing comprising

- (a) a revolving race and
- (b) a relatively stationary race
- (c) a plurality of rolls interposed between said races and,
- (d) having reduced portions intermediate their ends,
- (e) means carried by the stationary race only and projecting into the reduced portion of the rolls to engage shoulders formed by said reduced portions
- (f) in the event of misalignment of the rolls.

Stallman's basic concept was that instead of trying to hold the rollers against the skewing force and misalignment, the rollers are permitted to skew under the unbalancing forces until the shoulder of the reduced portion nearer the advanced side of the roller engages the stationary projecting ring or rail; and then the skewing force is utilized to retard the advanced side of the roller until the other or trailing side of the roller advances sufficiently to straighten the position of the roller and thus disengage the shoulder from the stationary projection or rail. This is repeated over and over again during such unbalanced condition of the bearing, but it performs with materially less friction than the devices which are trying to hold the rollers spaced or aligned constantly

against the skewing forces. Thus the locking of such roller bearing is positively prevented.

This was explained to the jury repeatedly and experiments were conducted to demonstrate the conflicting contentions of the parties.

The Court summarized to the jury this issue concisely in its instruction, as follows:

“In order that one of these patents may be granted by the Patent Office of the United States—and the Patent Office is the agency through which the government acts in passing upon these patents—it must appear from these claims that are set forth in the patent that the patentee has discovered something that has originality and novelty over and beyond what has theretofore been discovered and recorded in the Patent Office, which the lawyers have spoken of and called the prior art.

The particular patent that is involved in this case is what is commonly described as a combination patent. The plaintiff here has asserted in his claims an arrangement or combination of various elements which he says is something new in that it is an improvement over that which has gone before in that particular field. He doesn't claim that he invented any of these various elements that go to make up the combination, but that the arrangement that he has made of them and in the particular form that he sets forth in his complaint accomplishes a purpose beyond that which has heretofore been accomplished and is an improvement of a substantial nature over that which has gone before.

An applicant for a patent can not get a patent merely because he aggregates or puts together elements that have already been discovered. He must produce, as a result of his aggregation or bringing together of these elements, a combination which the law says entitles him to a patent because of the novelty and the improvement over the prior art which that particular aggregation of the so-called elements produces.

To illustrate that to you: What is involved in this case, as the lawyers have told you, is something that involves roller bearings. We have all heard the expression ball bearings probably more frequently, but these are rollers rather than balls.

The plaintiff in this case does not claim that the roller is something new; that the slot in the roller is something new; that the track upon which this proceeds in the rolling operation is something new, or that it operates between an outer and an inner surface which the lawyers have called races—none of those things he claims is new.

As I understand the contentions of the parties in this case, the principal contention of the plaintiff as to the originality of the claims of the patent is that this track on which the roller operates is fixed—the track is fixed to it and it remains immovable, whereas the other container, the inner container, may be movable. The chief claim that he makes is the rigidity or firmness of this outside container in which the roller bearing rolls over a fixed sort of a track.

The other side contends that that is not a novelty and that it is disclosed in these other patents that have been referred to.

So the principal direction that your efforts, in my opinion, should take in this case is that you should consider what the records and the testimony show in this case and determine whether or not this claim of the plaintiff in that regard is something that is new and novel. And in determining that, devoting your efforts to that consideration, you should bear in mind that the test as to invention or novelty as laid down by our Courts is this: that if that which has been developed or claimed to have been invented goes beyond what the ordinary artisan skilled in that particular field of mechanics could do, then it amounts to invention, and if it is not something more than the ordinary artisan or skilled—person skilled in that particular work would produce as a result of his general knowledge—if it is not something more than that, then it is not invention.” (Vol. I, pp. 270-273).

SPECIFICATION OF ERRORS.

1. The Trial Court erred in overruling the jury’s verdict that the differences between the subject matter of the claims of the patent in suit and the prior art are such that the subject matter as a whole would not have been obvious at the time the invention was made to a person having ordinary skill in the art to which such matters pertain.

2. The Trial Court erred in considering the comparison of prior patents with the claims in suit of plaintiff’s patent as a question of law, although the

same comparison is a question of fact on which the jury's verdict is final.

3. The Trial Court erred in disregarding that there is evidence of sufficient substantiality to support a verdict in favor of plaintiff, and in disregarding the rule of law that the jury's verdict is final on questions of fact and that conflicting evidence is for the jury and not for the Court on motion for directed verdict or for judgment notwithstanding the verdict.

4. The Trial Court erred in holding that the only reasonable conclusion that can be drawn from the comparison of the prior art with the teaching of plaintiff's patent is that the patent is invalid.

5. The Trial Court erred in its ruling that plaintiff's contribution to the art did not advance the frontiers of science in the narrow field of bearings so as to satisfy the exacting standards of our patent system.

6. The Trial Court erred in ruling as a matter of law that the claims of the patent in suit are invalid.

7. The Trial Court erred in setting aside the verdict of the jury and entering judgment in favor of defendant.

The rule governing nonsuits, directed verdicts, and judgments notwithstanding the verdict is clearly defined.

“In a jury trial of a patent case, the same rules prevail as in ordinary cases. There is no special exception simply because an alleged patent is involved.”

Hansen v. Safeway Stores, 238 F. 2d 336, 339.

“As was said in *Slocum v. New York Life Insurance Co.*, 1913, 228 US 364, 368-387, 335 S. Ct. 523, 57 L. Ed. 879:

‘But without a waiver of the right of trial by jury, by consent of parties, the Court errs if it substitutes itself for the jury, and, passing upon the *effect of the evidence*, finds the facts involved in the issue and renders judgment thereon.’ (Emphasis added.) The situation just alluded to by the *Slocum* case was where a verdict had been reached but the judgment had been set aside.”

Guerrero v. American Hawaiian Steamship Co.,
222 F. 2d 238, 243.

“But where the evidence is conflicting or there is insufficient evidence to make only a ‘one-way’ verdict reasonably possible, a directed verdict is improper.”

5 *Moore’s Federal Practice*, Sec. 50.02, 2316.

“In ruling on the motion the trial Court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.”

5 *Moore’s Federal Practice*, Sec. 50.02, 2316.

“In reviewing judgment n. o. v. for defendant, the appellate court of course applies the familiar rule that all facts which plaintiff’s evidence reasonably tends to prove and all favorable infer-

ences fairly deducible from those facts, must be assumed in support of the verdict.”

5 *Moore's Federal Practice*, Sec. 50.13, 2346.

THE PRIOR PATENTS.

The trial Court in its opinion passed upon certain physical similarities between three prior patents and the Stallman patent and disregarded factual evidence as to the differences in function and result.

Each of the prior patents considered by the trial Court has an inner race, an outer race, rollers between the races, and reduced portions on the rollers into which projects a rib or rail from the rotating race.

But a detailed consideration of these prior patents will indicate that all of these prior patents intended to resist skewing by holding the rollers as rigidly as possible in parallel position, and none permitted the utilization of the unbalancing skewing force to advance one side of the roller and then by action of the adjacent shoulder of the reduced portion on the stationary guide ring or rail to return the roller to parallel position.

Appellant here takes up the prior patents on which the trial Court relied as anticipation in the same order as discussed by the trial Court.

THE HEIM PATENT.

The object of the Heim patent was solely to prevent endwise movement of the rollers in a roller bearing in a special application, where the ring rotates with the hub of the wheel in which the outer race is held.

Heim's intention to hold each roller tight is expressed throughout that patent.

The Heim patent on page 1, lines 67 to 71 states:

“When the rolls are inserted into the device this inwardly projecting portion of the ring fits into a portion of the groove 15 of each of the rolls and prevents endwise movement of such rolls.”

On page 2, lines 29 to 34, the Heim patent declares unqualifiedly:

“The ring 16 remains in the position described and continues to prevent any endwise movement of the rollers relative to the shaft or to the parts 12, 12 of the device 11.”

On page 2, lines 64 to 67, the Heim patent again declares:

“In this case it is advisable to make the groove 23, corresponding to the groove 15 of Figure 3, likewise substantially square in cross-section so that it will closely fit about the ring.”

Thus the Heim patent leaves no doubt that the purpose of Heim was to hold the rollers without any play. Consequently, the rollers are not permitted to utilize unbalancing or skewing forces for first advancing the heavier loaded side and then utilizing the leverage on

the shoulder in contact with the ring or rail for straightening again the roller position.

The ring of Heim holds the rollers, not on the stationary race, but on the rotating race of the bearing and the device is locked in place by outside supports (Heim patent, p. 2, lines 15-20).

This Heim patent was a file wrapper reference and was considered during the prosecution of the application for the Stallman patent.

Consequently, the viewpoint of the Trial Court in comparing the Heim patent with the Stallman patent overrules the Patent Office point of view as well as that of the jury.

THE KEMPSTER PATENT NO. 585,580.

This Kempster patent illustrates another approach to prevent the locking of such bearings.

Kempster expressly provided such bearings for sheaves or wheels which rotate on a shaft and deliberately placed a "rib" in the rotating hub or race to project into a groove around the middle of each roller.

Kempster intends to hold the rollers "positively in proper alignment" by the rib. But Kempster's main teaching is the provision of an anti-friction separator disk held in the grooves of each pair of adjacent rollers to space the rollers apart. These roller separators are supposed to keep the rollers in proper operating positions. (Vol. II, p. 295, lines 85-95).

In such a construction if the rollers were permitted to skew in the manner of the Stallman patent, the grooves would be angled and the separator disks would be tightly bound "so as to completely destroy the antifriction qualities of the device". (Kempster patent p. 2, line 73).

This Kempster patent is not a file wrapper reference in the Stallman patent, but as it will appear, the same type of bearing was considered by the Patent Office in the Kempster Patent, No. 747,324 next to be discussed herein.

THE KEMPSTER PATENT NO. 747,324.

This Kempster patent as its main object proposes to definitely confine the rollers in "their proper relative positions". In other words, any skewing of the rollers in this Kempster device again would be contrary to the contemplation of this patentee. In fact, as explained above in connection with the earlier Kempster patent any skewing of the rollers would cause the slanting of the groove in the roller and as a result would tightly bind the separator disks and lock the bearing.

The difference between this Kempster patent and the previous Kempster patent is the provision of two tracks or two annular ribs, namely one projecting from the inner race and the other from the outer race.

This double track concept of Kempster is defined in Claim 6 of the patent without the spacer disks. But

such double track structure again does not utilize the skewing forces for advancing one side of the roller under load to apply the force through the adjacent groove shoulder against the ring and use that frictional force for straightening the roller. This Kempster patent prohibits such action and attempts to “hold” the rollers in their proper positions by two track ribs. (Kempster patent, p. 2, lines 69 to 82).

The Trial Court’s interpretation that Figures 4 and 5 of this patent suggest central guide rib “only” on the inner race is an error, because outer ring (9a) in each of those forms is definitely intended as a guide and track. (Kempster patent p. 2, lines 40 to 57).

This Kempster patent was a reference considered by the Patent Office before the Stallman patent was granted, hence the Trial Court’s opinion overrules the Patent Office as well as the verdict of the jury.

THE INTERPRETATION OF THE PRIOR PATENTS BY THE TRIAL COURT DECIDES QUESTIONS OF FACT WHICH OUGHT NOT BE RESOLVED IN THE ABSTRACT AND WITHOUT THE TESTIMONY AND DEMONSTRATIONS PRODUCED AT THE TRIAL.

This Honorable Court recently reiterated the well established rule:

“The issue as to whether there subsists in a device upon which letters patent have issued novelty, utility and invention is one of fact. This explains the allowance of a jury trial in such a case. Under the Constitution, a jury trial cannot be denied if one of the parties demand it.”

Hansen v. Safeway Stores, 238 F. 2d 336, 339.

The comparison of the prior patents with the Stallman patent merely shows that all refer to bearings and have certain physical characteristics in common. But a combination of old elements still amounts to invention if it performs a new and useful function.

Upon the record as a whole, there was sufficient evidence to raise a question of fact as to whether the Stallman patent performed a new and useful function by a combination of these elements known in the prior art.

Hansen v. Safeway Stores, supra, p. 340.

Stallman testified that Heim was not concerned with the problem of skewing (Vol. I, pp. 76, 77). Also that when the guide is on the rotating part the bearing will operate "for a short time but it will be full of friction" (Vol. I, p. 78); and "It will run sluggish, it will cause wear in the bearing, it will cause heat in operation, it will create many of the undesirable things in the antifriction bearing field." (Vol. I, pp. 78, 79).

Stallman further testified that when the guide rail is on the rotating part "the ring 15 would wobble engaging the shoulder 14 and 14 on both sides the roller alternately carrying the roller with it, and inducing skewing which we are trying to prevent." (Vol. I, pp. 79, 80).

As to the distinctive function and result of the Stallman combination, testimony was directly in conflict. Stallman testified as to the application of forces and results. (Vol. I, pp. 46-60, 86, 87, 96, 97, 99).

Defendant's expert, Dr. Spotts, a professor of mechanical engineering at Northwestern University maintained that the bearings did not operate the way Mr. Stallman testified (Vol. I, p. 164) and that skewing is "not important" (Vol. I, p. 168), and that engagement by a shoulder as in Stallman would not correct skewing (Vol. I, p. 169). He even endeavored to demonstrate this to the jury. (Vol. I, pp. 170 to 184).

Dr. Spotts at least conceded that the skewing was a "problem". (Vol. I, p. 188).

Dr. Spotts further conceded that the Heim patent is the closest to the Stallman patent (Vol. I, p. 241). Heim, however, was cited and considered by the Patent Office in granting the Stallman patent.

A review of the prior patents and other evidence in the record, therefore, indicates that there are questions of fact as to whether the Stallman patent is valid or had been exemplified in previous devices. Such a review must also reveal that there is substantial evidence to sustain the contentions of plaintiff and the verdict of the jury.

THE JURY'S VERDICT THAT THE STALLMAN PATENT WOULD NOT HAVE BEEN OBVIOUS AT THE TIME IT WAS MADE TO A PERSON HAVING ORDINARY SKILL IN THE ART IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OUGHT NOT BE SET ASIDE.

The trial Court instructed the jury very plainly as to the test to determine the presence or absence of

invention in the Stallman patent. (Vol. I, pp. 270-273).

This criterion for invention is the rule in Title 35 United States Code, Section 103.

Obviousness must be determined by comparisons and facts.

At the trial of this case Dr. Spotts, defendant's expert, conceded the existence of the problem (Vol. I, pp. 172, 173, 188), but disagreed that the Stallman patent solved that problem. (Vol. I, p. 168).

On the other hand Stallman testified that his solution to the long vexing problem was successful (Vol. I, pp. 54, 86, 87, 96).

The issue of obviousness was thus resolved by the jury on conflicting evidence, comparisons and contentions and there were substantial grounds for the verdict.

Since the rule was first stated by the Supreme Court in *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, the question of whether the improvement is beyond the skill and ingenuity of a mechanic, or a man skilled in the art, was consistently treated as a question of fact and not a question of law.

In *Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F. 2d 628, at 630, this Court reiterated the rule:

“Appellant's brief states: ‘The validity of the claims at issue of plaintiff's Cappelli's patents depends upon whether the structures they define, when compared with the prior art structures, result from the exercise of invention or merely

from mechanical skill of those versed in the art.' The question thus presented is one of fact." (citing cases).

As heretofore demonstrated, the prior patents and Stallman patent are not the kind that can be compared in the abstract, they must be considered in their practical industrial environment, as the jury considered them, and the trial Court erred in treating such comparison as a question of law for the Court and in resolving all inferences from the prior art against the verdict.

In the abstract the difference between the Stallman patent and the prior patents may appear to be simple, especially in hindsight, but when considered in the light of the apparent long struggle of the industry with the problem until successfully solved by Stallman, the real stature of the difference becomes evident.

The trial Court ought to have drawn inferences in accordance with the admonition of this Court stated in *Patterson-Ballagh Corp. v. Moss*, 201 F. 2d 403, at page 406:

"... It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art. 'Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention.' "

CONCLUSION.

The issues raised and decided by the Trial Court were issues of fact within the province of the jury. The Trial Court in granting the motion notwithstanding the verdict substituted itself for the jury and passed upon the effect of the evidence and found the facts involved in the issues. Reasonable men (the jury in this case) came to a conclusion contrary to that of the Trial Court. Inasmuch as all favorable inferences fairly deducible from the facts herein should be assumed in support of the verdict, the Trial Court was in error.

We respectfully submit to your Honors that under such circumstances the decision was for the jury, and the judgment of the Court notwithstanding the verdict should be reversed.

Dated, San Francisco, California,
February 25, 1957.

Respectfully submitted,

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No. 15,328

In the

United States Court of Appeals

For the Ninth Circuit

RALPH F. STALLMAN,

Appellant,

v.

CASEY BEARING COMPANY, INC., a corporation;
and T. W. CROSBY,

Appellees.

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No. 15,328

In the
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RALPH F. STALLMAN,

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CASEY BEARING COMPANY, INC., a corporation;
and T. W. CROSBY,

Appellees.

Brief for Appellees

STATEMENT OF THE CASE

Appellant's Complaint (Tr. Vol. I, pp. 3-6) originally charged the Appellees named above and McGill Manufacturing Co., with infringement of the Stallman patent 2,334,227, of Nov. 16, 1943, for a Needle Bearing (Tr. Vol. II, p. 286). The action was dismissed on motion as to McGill Manufacturing Co., by order of August 9, 1954. Appellees denied (Tr. Vol. I, pp. 6-11) both validity and infringement of the patent. Appellant demanded a jury trial and the case was so tried before the Honorable Louis J. Goodman, Judge of the District Court.

At the conclusion of the evidence, Appellees moved for a directed verdict in their favor on the ground that the

claims of the patent in suit were invalid as a matter of law (Tr. Vol. I, pp. 263-4). That motion was denied (Tr. Vol. I, p. 264). The jury returned a verdict that the patent in suit was valid and infringed by Appellees as to Claims 3, 4, 5 and 9 (Tr. Vol. I, p. 13 and 279) and Judgment was entered thereon (Tr. Vol. I, p. 14).

Appellees then moved for judgment notwithstanding the verdict and for a new trial (Tr. Vol. I, pp. 15-26). The District Court rendered an Opinion Upon Motion for Judgment Notwithstanding Verdict (Tr. Vol. I, pp. 27-34) and entered a Judgment granting the motion for judgment n.o.v., setting aside the verdict and judgment entered thereon (Tr. Vol. I, pp. 34-35).

**THE SOLE QUESTION PRESENTED BY THIS APPEAL IS
WHETHER THE DISTRICT COURT ACTION WAS COR-
RECT**

The only question presented by this Appeal is whether the District Court acted correctly in granting Appellee's Motion for Judgment Notwithstanding the Verdict.

It is quite clear that in this case the District Court acted in strict accordance with the rules which, in patent cases as in any other, is deemed well settled and hence there was no impropriety in the action taken.

SUMMARY OF THE ARGUMENT

1. There Was No Impropriety in the Granting of Appellee's Motion For Judgment Notwithstanding the Verdict.
2. The Prior Art Clearly Demonstrates The Correctness of the Trial Court's Judgment.
3. The Claims of the Patent in Suit Do Not Measure the Invention as Patented or as Presently Claimed by Appellant.

4. The Perception or Recognition of New Advantages in Old Structures Does Not Rise to the Dignity of Invention.
5. McGill is Not a Party to the Action.
6. Conclusion.

THERE WAS NO IMPROPRIETY IN THE GRANTING OF APPELLEE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

It is argued by Appellant (Brief pp. 16-18) that upon the record, as a whole, "there was sufficient evidence to raise a question of fact as to whether the Stallman patent performed a new and useful function by a *combination of these elements known in the prior art*". It is not clear whether by "a combination of these elements" appellant is alluding to the combination of elements shown and described in the Stallman patent or whether the reference is to Appellant's present conception of what the Stallman patent was intended to speak about but did not. In either event any fair appraisal of the prior art patents, such as will follow herein, reveals that in granting the Appellee's motion for judgment n.o.v. the District Court was simply performing its duty so clearly spelled out in the decisions of this Court in cases where the claimed invention does not meet the rules and standards established to determine the presence or absence of invention.

This Court, on at least two different occasions, (i.e., in *Himes v. Chadwick*, 199 F(2d) 100, 95 USPQ 59 and *Berkeley Pump Co. v. Jacuzzi Bros., Inc.*, 214 F(2d) 785, 102 USPQ 100, 105) has seen fit to embrace the rule of *Packwood v. Briggs & Stratton Corp.*, 3 Cir., 195 F(2d) 971, 973, 93 USPQ 274, concerning the right and duty of the trial judge to appropriately deal with situations where the circumstances indicate that the jury has departed or could de-

part from “the relevant criteria by which either a jury or judge must be guided in their *fact-finding function*”.

The rule was succinctly stated in the *Packwood* case as follows (93 USPQ 275):

“This finding of invention and validity was very clearly wrong. A jury in a patent case is not free to treat invention as a concept broad enough to include whatever discovery or novelty may impress the jurors favorably. Over the years the courts of the United States and particularly the Supreme Court, have found meaning implicit in the scheme and purpose of the patent laws which aids in the construction of their general language. In this process, rules and standards have been developed, for use as guides to the systematic and orderly definition and application of such a conception as invention in accordance with what the courts understand to be the true meaning of the Constitution and the patent laws. Once such standards and rules are authoritatively announced any finding of ‘invention’ whether by a court or a jury must be consistent with them.”

There the jury had brought in a verdict that plaintiff’s patent was “valid as to lawn mowers only”. The trial judge, while candidly stating his own conviction that the patent was invalid for lack of invention, denied a motion for judgment n.o.v., upon the reasoning that “he had no authority to substitute his judgment on the contested issue of invention for that of the jury”. The Court of Appeals reversed with the observation (93 USPQ 276):

“In the instant case the district court should have entered judgment n.o.v. upon the basis of a ruling that, consistent with controlling standards, the device in suit plainly could not embody invention.”

In the *Himes* case, *supra*, this Court adopted the rule of the *Packwood* case and observed it as “well expressed” (95 USPQ 60). There this Court affirmed a judgment n.o.v. because its examination of the record convinced it that it was an appropriate case for the exercise of the powers of the trial judge as defined in the *Packwood* decision. It summarized its conclusions in this manner:

“Measured by these standards and by the rules generally announced by the Supreme Court as tests for invention, we think that so far as the Parks patent is concerned, this is a clear-cut case of lack of invention and that under the rule we have stated above as to its claims it was the duty of the court to enter a judgment n.o.v.”

Of like import was the holding of this Court in the *Berkeley Pump* decision, *supra*. There the Court affirmed the trial court’s judgment for a directed verdict being convinced that it represented an appropriate exercise of “the power of a trial court over a jury verdict in patent cases”.

Absent this rule, jury verdicts, such as the one in the instant, could lead to ludicrous results. Upon the one hand we would have standards and rules announced for the testing of invention by the courts and upon the other juries would be free to “treat invention as a concept broad enough to include whatever discovery or novelty may impress the jurors favorably” (Cf. the *Packwood* decision (93 USPQ 275)). Such a double standard has no place in American jurisprudence.

The decision of this Court in *Hansen v. Safeway Stores, Inc.* 238 F(2d) 336, does not aid appellant. In the first place that case involved unusual facts and proceedings clearly distinguishing it from the case at bar. There the jury disagreed and was discharged, leaving unresolved disputed

questions of fact relative to validity of the patent in suit. The Trial Court entertained and granted a motion for a directed verdict, notwithstanding the existence of “two propositions of fact”, namely, (1) a strong presumption of validity of the patent created by appellate action of the Court of Customs and Patent Appeals and (2) “there was no evidence of prior art or anticipation sufficient to take the case out of the province of the jury”.

Neither of these propositions appears in the instant case. Here the asserted invention had never met the appellate test of the Patent Office tribunals or the Court of Customs and Patent Appeals and, in fact, the presumption of validity was substantially impaired, if not destroyed, by prior art not referred to by the Patent Office. Validity is likewise destroyed by Appellant’s obvious failure to comply with 35 U.S.C. 112 in the absence of a written description or claims pointing out and distinctly claiming the subject matter which Appellant now regards as his invention (as to which more will be said elsewhere in this brief under an appropriate heading). Furthermore, here there was *abundant* evidence of prior art or anticipation sufficient to take the case out of the province of the jury, as the District Court held.

It is of the utmost significance that this Court, in deciding the *Hansen* case as it did, reiterated the rule that it laid down in the earlier case of *Himes v. Chadwick*, 199 F(2d) 100, 95 USPQ 59, by saying (page 172 of 110 USPQ).

“It is perfectly true that, even if a jury has found a patent to be valid, the trial court can set aside the finding and enter a judgment for defendant, *if there are no grounds for the verdict.*” (Emphasis supplied.)

But Appellant would have it believed that some other and different rule applies, placing a halo around the jury’s ver-

dict in every patent case regardless of the facts and circumstances. Appellee does not understand that to be the law and it is believed clear from the record that the judgment appealed from was fully justified and proper.

THE PRIOR ART CLEARLY DEMONSTRATES THE CORRECTNESS OF THE TRIAL COURT'S JUDGMENT

The prior art patents so straitjacketed the Stallman patent by anticipation as to oblige Appellant to adopt a version of the invention wholly different from that set forth in the specification and claims. Elsewhere in this brief we have dealt with the fact that Appellant's current version of the invention was not disclosed or claimed and therefore the patent is invalid for failure to comply with the patent statutes. There will be no need to dwell on that proposition at this point of the brief. But it is manifest that taken either in the light of the patent disclosures or Appellant's present version, the Stallman concept did not meet the standard of invention and, moreover, was anticipated.

We turn now to a consideration of the prior art patent in chronological order.

A. The Kempster Patent (585,580)

It should first be noted that this patent was *not* cited by the Patent Office during prosecution of the Stallman patent application.

Kempster 585,580 (See copy Tr. Vol. II p. 294) indicates that the bearing art had progressed substantially, if not entirely, to the point of Stallman's claimed invention as early as the year 1897. It shows and describes an Anti-friction Journal Bearing having an outer bushing or casing 2 with interior circular track surfaces 3 (which are the outer races of the bearings as in the case of Stallman's outer

race 10) separated by a narrow projecting annular rib 4. The bushing or casing 2 is provided with means, such as the outer flange 5, for securing it to wooden sheaves or wheels by suitable screws.

Anti-friction rollers 6 are distributed entirely around the interior of the bushing or casing 2, each roll having an annular groove 7 about its center "of sufficient width to loosely receive the annular projecting rib 4". The annular grooves 7 are additionally described as:

"* * being preferably of greater depth than said rib, so the smaller diameter of the rolls will not bear upon the top surface of the rib * *'" (Tr. Vol. II, 295, Col. 2, lines 76-78)

In this Kempster version of a bearing the journal 8 serves as the inner race for the rollers 6 (just as Stallman utilizes 11 as an inner race or would employ a shaft in lieu of the inner race 11).

To this point Kempster was foreshadowing Appellant to at least the extent of the devices shown in Figs. 1 and 4 of the Stallman patent, since the description of the Kempster parts and their relationship aptly fits the devices illustrated in those illustrations and there would be no substantial, perceivable difference in function. All that is missing is the Appellant's current theory of the operation of his device, namely, that the guide ring or rail (the rib 4 of Kempster) should be placed on the stationary race or member of the bearing to permit correction of the skewing action of the rollers. But that version of Stallman is neither disclosed nor claimed in the patent in suit and, at best, represents Stallman's present perception of how the device should work.

To this basically described structure Kempster added his antifriction disks 9 which were placed between the rolls 6.

The disks were slightly thinner than the central groove 7 in the rolls 6 "so as to fit loosely therein" and roll upon the smaller diameter of the rolls 6 (as defined by the grooves 7) and upon the top surface of the annular rib 4. As the trial court correctly observed (Tr. Vol. I, p. 31) it is apparent that these separators or antifriction disks 9 would not be necessary to the operation of the bearing described. This much is obvious from a consideration of the operability of the basic Kempster structure above-described and the fact that the specification of Kempster 747,324 states such separators may be entirely dispensed with, if so desired (Tr. Vol. II 309, l. 87-91), as the District Court noted (Tr. Vol. I, p. 31, footnote).

Beyond this Kempster even anticipated Stallman's use of a split ring 16 to keep the rollers 12 in place when the inner race 11 was removed. Kempster shows a split ring 10 for the purpose of holding the rollers 6 in place and prevent the bearing from falling apart during shipment (Tr. Vol. II, p. 296, l. 3-32).

Obviously, upon removal or omission of the separator disks 9, the Kempster device would function precisely as Stallman's device when the latter is viewed in the light of the patent disclosure, since the loose fit of the parts would permit misalignment of the rollers 6 under uneven load distribution and realignment when the shoulder defined by the groove 7 bore against the rib 4. Moreover, the parts could be re-dimensioned as desired within the skill of the calling and this would not involve invention.

B. The Kempster Patent 747,324

This patent (see copy Tr. Vol. II, p. 308) teaches that, if desired, the guide rib or rail 8 may be formed as an integral part of the inner race 4 and project outwardly there-

from into the annular groove 2 of the rollers 1. (Tr. Vol. II, p. 310, 1. 35-39). Obviously when such a bearing is fitted onto a shaft or axle, as is the case of a pulley or wheel, the inner race 4 would be *stationary* and the outer race 5-6 would rotate, precisely as in the device of Stallman's patent Fig. 2 (Tr. Vol. II, p. 286).

True enough this patent also shows a second guide rib, in the form of a ring 9 "separate from the outer bushing (5-6) and entering an annular groove formed at the meeting edges of the sections 5 and 6" of the outer bushing, and projecting into the grooves 2 of the rollers 1. When thus locked in place there are two guide ribs, i.e., inner 8 and outer 9. That structure satisfies the brief description given at page 15 of Appellant's Opening Brief.

But had Appellant read this Kempster patent further it would have been observed that in another form (Figs. 4 and 5), Kempster provided that the: (Tr. Vol. II, p. 310 lines 50-58)

"* * or said ring 9a may be made with a diameter a little less than the inner diameter of the sections 5 and 6 of the outer bushing *and be free to rotate within said outer casing*, if so desired, but in no case allowing said ring to move from a position where its surface will be other than concentric with the track on the outer bushing for the rolls." (Emphasis supplied.)

A comparison of that structure with Fig. 2 of the Stallman patent (Tr. Vol. II, p. 286) will reveal that, in both instances, the guide ribs 8 and 15 on the respective inner races are used as the primary guide means and that the only difference between the structures lies in the relative dimensioning of the rings 9a and 16.

It clearly appears, therefore, that the trial court was correct in viewing Kempster patent 747,324 as showing the

central guide rib on the inner race (Tr. Vol. I, p. 33) since the free ring 9a would not be the primary guide rib and the guiding effect it might have would be negligible in the same sense that Stallman's keeper ring 16 would act as a guide rib.

Kempster patent 747,324 therefore spells out anticipation of the invention set forth in the patent in suit as well as Appellant's more recent version of his invention.

C. The Zahn British Patent No. 17,841

Next in the order of chronology, attention is turned to the British patent to Zahn, dated August 8, 1906, which will be found at Tr. Vol. II, p. 292. It is there identified as "Haddan's Complete Specification", Reginald Haddan having been the Patent Agent to whom Zahn communicated the invention (Tr. Vol. II, p. 292, lines 1-5).

The Zahn patent is important because it completely negates Appellant's present theory that he was the first to recognize or perceive that, instead of trying to hold the rollers against the skewing force and misalignment, the rollers could be permitted to skew under the unbalancing forces until the shoulder of the reduced portion nearer the advanced side of the roller engages the stationary projecting ring or rail and to then utilize the "skewing force" to retard the advanced side of the roller until the other or trailing side of the roller advances sufficiently to straighten the position of the roller and thus disengage the shoulder from the stationary projection or rail (Appellant's Opening Brief, p. 6).

Zahn illustrated and described this principle and even went so far as to provide a bearing structure utilizing that principle. The illustration of the principle is found in Fig. 1 of the Zahn patent drawings and the description of that illustration is clearly and explicitly set forth in Page 1 of Zahn's complete specifications, lines 19-34. It need not be

repeated here, but suffice it to say that Zahn clearly teaches that when misalignment occurs and one end of the roller advances in relation to the other, frictional engagement of the roller with other components of the bearing can be utilized to right or straighten out the roller.

Zahn applied that principle to structure basically like the structures of the Stallman patent. It will be noted that Figures 2 and 3 of Zahn are described as the application of the righting principle to vehicle or other bearings where the inner journal member *b* is fixed (or stationary) and the outer bearing member *c* rotates (Zahn patent p. 1, lines 40-42). Thus the guide rail *g* is "fastened or formed" on the stationary bearing member *b*, just as Stallman now insists that his central guide rib or rail must be positioned or placed on his stationary bearing member.

In the bearing of Zahn's Figs. 4 and 5 the inner journal member *b* rotates, and the track ring *g* assembly is secured to that member, while in Fig. 6 the track ring *g* acting to engage and retard the advanced end of the roller, is on the outside stationary member *c*. In other words, Zahn recognized and applied his principle, as explained for Fig. 1, to a roller bearing with the guide rail on the stationary member as well as to a rotating member, thus teaching that, as early as the year 1906, the matter of placement of the guide rail was optional. It was a matter of "preference", depending upon the ultimate bearing installation and use.

In like vein Appellee's Vice-President Hoffman (Tr. Vol. I, pp. 123-132) testified to successful operation of the "Guiderol" bearing whether the guide rail or track ring was on the rotating race, or the stationary race, and that the customer was not concerned in any way with this condition alone.

While the District Court did not rely on this patent for its judgment, nevertheless it has anticipatory value and

may be considered by this Court, especially since it was *not* cited by the Patent Office.

D. The Heim Patent

The Heim patent is also significant since it clearly illustrates a structure wherein the outer raceway has an inwardly projecting central guide ring, rib or rail (Figs. 3, 4 and 5) entering a reduced neck portion formed by the groove 15 in rollers 14. The shaft 17 serves as the inner race. Figs. 1 and 2 show the outer race or member 10 as the hub of a wheel, but that form is described as an example. (Tr. Vol. II, p. 303, lines 37-40). Heim does not, however, disclaim operability of his device in situations where the outer member 12 carrying the central guide rib would be stationary and the shaft 17 would be the rotatable member and it is obvious that it could so operate.

About the only distinction that Appellant draws between the Stallman device and the Heim structure is the asserted relative tightness of fit of the parts, as indicating that the purpose of Heim was to hold the rollers without any play (Opening Brief p. 13-14), but, as we have seen from a study of the other prior art patents, there was no novelty in making these bearing devices with loosely fitting parts if desired and one would be equally free to do so in uses of the Heim structure. In fact, any skilled bearing man would be expected to gauge the tolerances according to the need.

This examination of the prior art patents leads inescapably to the conclusion that Stallman merely utilized and put together devices well known in the bearing art. The devices he assembled each had well known separate functions and they were assembled for the mere sum or aggregate of those functions. Stated otherwise, the devices in the aggregation did not functionally operate differently than before.

This Court, in *Jacuzzi Bros. Inc. v. Berkeley Pump Co.*, 191 F(2d) 632, 91 USPQ 24, 29 (CA 9) laid down the following rule respecting such combining of devices well known in the art:

“* * * there is no invention in the placing together of devices well known in the art, however novel and useful may be the results, unless a functional difference from all previously known constructions be achieved. *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U.S. 545, 549, 550.”

See also *A & P Tea Co. v. Supermarket Corp.*, 340 U.S. 147, 152, where it was said:

“The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law. *Mahn v. Harwood*, 112 U.S. 354, 358. The Court fashioned in *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, a rule for patent cases to the effect that this Court will not disturb a finding of invention made by two lower courts, in absence of a very obvious and exceptional showing of error. That rule, imported from other fields, never had a place in patent law. Having served its purpose in *Graver Mfg. Co. v. Linde Co.*, it is now in substance rejected. The Court now recognizes what has long been apparent in our cases: that it is the ‘standard of invention’ that controls. That is present in every case where the validity of a patent is in issue. It is that question which the Court must decide. No ‘finding of fact’ can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case. We speak with final authority on that constitutional issue as we do on many others.” (Emphasis supplied.)

When considered in this light, it is perfectly obvious why the District Court was persuaded that the only reasonable

conclusion that could be drawn was that the patent is invalid. Any other conclusion would have required a total disregard for the established tests for invention.

THE CLAIMS OF THE PATENT IN SUIT DO NOT "MEASURE THE INVENTION" AS PATENTED OR AS PRESENTLY CLAIMED BY APPELLANT.

It is not without significance that Appellant's Opening Brief does not face up squarely to the proposition that, in considering the question of the validity of the Stallman patent, it is the claims of the patent that must be examined. The claims here relied on (3, 4, 5 and 9) do not distinguish from the prior art. Therefore Appellant's argument is predicated on the assumption that the Court should ignore the patent and consider the Stallman concept as though it were some common law right rather than a creature of the statute.

The basic rule for considering patent rights has been well stated in *Walker On Patents*, (Deller's Edition), Vol. II, page 770, as follows:

"It is the claims of a patent which 'measure the invention,' and which 'apprise the public of what is still left open to them.' (Paper Bag Pat. Case, 210 U.S. 405, 409; U.S.L. & H. Corp. v. Safety Car H. & L. Co., 261 Fed. 915, 918, C.C.A. 2; Fulton Co. v. Powers Reg. Co., 263 Fed. 578 580, C. C. A. 2; Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 61 L. Ed. 871, 876.) A claim is not 'like a nose of wax which may be turned and twisted in any direction,' so as to make it include something more than, or something different from, what its words express, by merely referring to the specification. The claims are the creature of statute in which the inventor is required to particularly point out and distinctly claim his invention. (White v. Dunbar, 119 U.S. 47, 51.)"

Appellant states at Page 6 of the Opening Brief that the Stallman patent is simple and is well defined, for instance in Claim 5 of the patent, which is quoted. The brief then progresses to a current version of the Stallman invention or basic concept. But nowhere does Appellant point out in his Brief that the claims of the patent in suit allude or refer to the idea of permitting the rollers to skew under the unbalancing forces until the shoulder of the reduced portion nearer the advanced side of the roller engages the stationary projecting ring or rail, or that the "skewing force" is utilized to retard the advanced side of the roller until the other or trailing side of the roller advances sufficiently to straighten the position of the roller and thus disengage the shoulder from the stationary projection or rail. Nor does Appellant point out that the claims set forth that this action is repeated over and over again during an unbalanced condition of the bearing or why it performs with materially less friction than the devices which are trying to hold the rollers spaced or aligned constantly against the skewing forces, as set forth at Page 6 of Appellant's Opening Brief. The reason is quite clear. This so-called basic concept is not spelled out or defined in any of the claims of the Stallman patent.

Thus, as said elsewhere in this Brief, the claims fail to comply with the Statute (35 U.S.C. §112) requiring that they particularly point out and distinctly claim the subject matter which the patentee regards as his invention. Instead the claims, including Claim 5 used as an example in Appellant's Opening Brief, are broader than and different from the presently asserted invention of Stallman and are equally descriptive of bearings conforming to the prior art.

Since the claims in suit are relatively brief, we have set them forth below in their entirety with appropriate comparison with the prior art.

STALLMAN CLAIM 3

PRIOR ART

- | | |
|---|--|
| A bearing comprising | <i>Heim 1,885,914</i> |
| (a) a rotatable inner race and | Shaft 17; Fig. 1
(whether it is stationary or rotating is purely optional) |
| (b) a relatively stationary outer race | Element 12; Fig. 3
(optional as to its being stationary or rotating) |
| (c) rollers interposed between said races and having aligned reduced portions intermediate their ends, | Rollers 14 |
| (d) a ring carried by the outer race and projecting into the reduced portions of the rollers to prevent their longitudinal movement and | Ring 16'; Figs. 1, 2 and 3. |
| (e) a second ring registering with and permanently contained within said reduced portions to hold the rollers in position in the outer race when the inner race is removed. | Ring 16'; Fig. 3
(the dimensions of this ring and whether this ring is permanent or ejected are purely optional characteristics (Tr. Vol. II, p. 304, lines 68-83)) |

As the prior art clearly demonstrated, it is purely optional which bearing race remains stationary and which rotates. It depends upon the particular use and therefore is a matter of choice. This much is impliedly conceded by Stallman in his patent when he merely states a *preference* for the stationary member in the placement of his central guide rib, without explaining why this is so. In fact, the two words of *preference* (Tr. Vol. II, page 288, column 1, lines 26-31) comprise the only support to which Appellant can point for his present contention of invention.

The same may be said with respect to whether the keeper ring 16, is permanently contained, as in Rydbeck (Tr. Vol. II, p. 300) or ejectably contained, as in Heim (Tr. Vol. II, p. 302). That characteristic is not a patentable one.

STALLMAN CLAIM 4

KEMPSTER 747, 324 (Fig. 4)

A bearing comprising

(a) A revolving race and

The casing or element 5-6.

(b) A relatively stationary race,

Inner race or bushing 4.

(c) A plurality of rolls interposed between said races,

Rolls 1.

(d) And means carried by the stationary race only and engagable with the rolls intermediate their ends in the event they become misaligned with their normal positions.

The central guide rib or rail 8 projecting into the grooves 2 of the rolls 1.

As hereinabove noted central guide rib 8 is the primary means "engagable with the rolls intermediate their ends in the event they become misaligned with their normal position". The fact that Kempster teaches a second ring 9a may be added does not detract from the anticipatory value of the prior patent, especially in view of the fact that its guiding effect would be negligible, if not questionable.

STALLMAN CLAIM 5

KEMPSTER 747, 324 (Fig. 4)

A bearing comprising

Elements 5-6

(a) a revolving race and

(b) a relatively stationary race,

Element 4

(c) a plurality of rolls interposed between said races and,

Rolls 1

(d) having reduced portions intermediate their ends,

The grooves 2

- (e) means carried by the stationary race only and projecting into the reduced portions of the rolls to engage shoulders formed by said reduced portions in the event of misalignment of the rolls. Central guide rib 8

As stated in connection with claim 4, the presence or absence of Kempster's secondary ring 9a is of no moment since its guiding effect is negligible, if not questionable. Moreover, it (9a) could serve the same function as the retainer ring 16 of Stallman serves in his structure of Fig. 1 or Fig. 2.

STALLMAN CLAIM 9

KEMPSTER 585, 580

- A bearing comprising
- (a) a cylindrical inner race Shaft 8
and
 - (b) an outer race, 3 on 2
 - (c) a plurality of rolls having reduced portions intermediate their ends interposed between said races, Rollers 6 with grooves 7
 - (d) a ring carried by the outer race and registering within the reduced portions of the rolls to engage the rolls in the event they become misaligned with their normal position and Ring 4
 - (e) a second ring contained by said reduced portions of the rolls adjacent the inner race to retain the rolls in place against the outer race when the races are separated. Ring 10

If the word “contained” as here used is to denote permanent presence, it makes no difference, patentwise, whether the ring stays in or is ejected since its stated function is to hold the rollers in place when the inner race is separated from the outer race and roller assembly. Kempster 585,580 (not cited by the Patent Office), teaches that much. See keeper ring 10 (Tr. Vol. II, p. 294), Figs. 2, 3, 9 and 10 and the description thereof (Tr. Vol. II, p. 296, lines 3-32). See also Rydbeck (Tr. Vol. II, p. 300, ring 6).

The above comparison of the prior art could be extended, as there are other examples of the aptness of the description of the Stallman claims to prior art devices, but there appears to be no need to do so. The foregoing is believed adequate to demonstrate that this art is so crowded as to leave no room for the assertion of a claim to invention in the sense of the Stallman claims 3, 4, 5 and 9 and certainly not in the sense of Appellant’s presently claimed version of his concept.

In addition, the applicability of the principles so clearly laid down in *Winslow Engineering Company v. LeRoy R. Smith*, 223 F(2d) 438, 106 USPQ 209, a case decided by this Court, will be readily apparent. There the Court felt compelled to hold the Winslow claims invalid for failure to comply with the statute and stated that it did not feel free to resort to the specification in an effort to draw therefrom limitations to save the claims. Here, as we have elsewhere stated, Stallman is in a less favorable position than was Winslow, because Stallman’s specification is equally lacking in the requisite degree of particularization and, hence, there is nothing from which to draw any saving limitations.

While the foregoing fully answers the contentions set forth in Appellant’s Opening Brief, it is believed fitting

to specifically comment on pages 4, 6 and 12 thereof wherein attempt is made to re-define the Stallman concept. Appellant has shown no new and unobvious function or result that his device has over the prior art even when the latest version of it is considered. The grooved rollers of Kempster, Heim and Zahn, straddling a guide rail, rib or ring as they do, will of necessity engage the same when there is misalignment of one of such grooved rollers. The amount of misalignment of the rollers held between the two races on top and bottom and engagement of the groove wall with the rail, will be limited. But if the spacing of the rollers between the two race rings, spacing between the roller grooves and corresponding rails or ribs and the permitted degree of skewing was important and significant, then the patent itself *must* define these dimensions and conditions (35 U.S.C. §112). Since Stallman's patent has no such description the claims are invalid for insufficiency of disclosure.

**THE PERCEPTION OR RECOGNITION OF NEW ADVANTAGES
IN OLD STRUCTURES DOES NOT RISE TO THE DIGNITY
OF INVENTION**

It has been demonstrated elsewhere in this brief that Stallman was a late comer in the bearing art. Others before him (notably Heim, Kempster and Zahn) had devised bearings consisting of outer and inner races with rollers (and even needles, as in Heim) having reduced neck portions intermediate their ends and with guide ribs or rings fitting into the reduced portions of the rollers to present endwise motion of the rollers or to maintain the rollers in position. Further, and as the District Court correctly observed (Tr. p. 32), the prior art reveals both a bearing with the central guide rib on the outer race and a bearing with the guide rib on the inner race, and either

type of these bearings could be appropriately employed in applications in which the race having the guide rib would be stationary.

Appellant fully recognized that such could be the case since he declared (Tr. Vol. II, p. 288, Col. 2, lines 51-62):

“The invention as herein disclosed is applied to a bearing having both an inner and an outer race. It is customary to manufacture bearings with an outer race only to run on a shaft which takes the place of the inner race, and also to manufacture bearings with an inner race only, with the inner periphery of a gear or pulley hub serving as the outer race. The present invention is adaptable to these uses as is apparent from the foregoing description and drawing and wherever the term “race” is used herein, it is intended to include any surface on which the rollers operate.”

The uncontroverted evidence adduced by the defendant was that satisfactory bearing operation was obtained in a substantial number of installations irrespective of whether the guide rib or rail was on the stationary or upon the rotating race of the bearing installation (Tr. Vol. I, pp. 124-132).

Against this backdrop appellant contends that he was the first to recognize that the old devices of the art “had a theretofore unperceived advantage which would be realized in some old and common applications, but not in others” (Tr. Vol. I, p. 33). Even assuming, *arguendo*, that this was true, it is settled law that mere perception of such advantages does not in and of itself constitute invention. This Court, in *Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp.* 179 F(2d) 80, 84 USPQ 54, so held. In the *Cutter* case the jury had, *inter alia*, brought in a verdict sustaining the validity of Claim 6 of the Reichel patent. This Court

held that claim invalid for lack of invention over the prior art saying:

“Where a process has been fully disclosed in the prior art without full appreciation of all its valuable attributes, the perception of new advantages in the old process does not in itself constitute invention. *General Electric Co. v. Jewell Incandescent Lamp Co.*, 326, U.S. 242, 247-249 (67 USPQ 155, 157-158) (1945); *Celite Corp. v. Dicalite Co.*, 96 F. 2d 242, 248 (37 USPQ 383, 388-389).”

This same principle had previously been applied by the Supreme Court of the United States in a mechanical patent case, namely, *General Electric Co. v. Jewel Incandescent Lamp Co.* 326 U.S. 242, 248, saying:

“The principle of the *Ansonia* case plainly would deny validity to the Pipkin patent if the prior art disclosed an electric bulb so frosted on the inside as to round out the angular crevices produced by the first etching, *whether the full utility of the bulb had been previously recognized or not*. The same result is indicated where, as in the present case, the prior art discloses the method of making an article having the characteristics of the patented product, *though all the advantageous properties of the product had not been fully appreciated*.” (Emphasis supplied.)

This Court applied this same principle in *Kalich v. Paterson Pacific Parchment Co.* 137 F(2d) 649, 58 USPQ 637, 640, with this statement:

“Skill by one of the trade rather than invention was involved in the solution here. Patentees are not entitled to a monopoly for the judicious use of materials the use of which would produce the result to be expected from such selection. Recognition is not invention. *Continental Fibre Company v. Formica Insulation Company*, 287 F. 455; *Vitamin Technologists, Inc.*,

a Corporation v. Wisconsin Alumni Research foundation, 9 Cir. 136 F. 2d 318 (58 USPQ 293); Aero Neck-Band & Collar Company v. Beaver Mfg. Co., 97 F. 2d 363, 365 (38 USPQ 153, 155).”

Equally declarative of the invalidity of patents like the Stallman claims in suit, insofar as they purport to confer a monopoly on Appellant for his work in re-dimensioning and reportioning of the prior art bearings, was the following language in the *Kalich* case (58 USPQ 640):

“There is the old rule that one is not entitled to a patent who merely makes a change in form, proportion or degree, by substantially the same means even though the changes he makes produce better results. *Burt v. Ivory*, 133 U.S. 349; *Market Street Railway Co. v. Rowley*, 155 U.S. 621; *In re Prescott, et al.*, 49 F. 2d 825 (9 USPQ 236); *Monckmeier v. Erie Mfg. Co.*, 98 F. 2d 369, 371 (38 USPQ 200, 203); *Wagner v. Meccano, Ltd.*, 246 F. 603, 608 and citations.”

It follows then that the District Court was justified in refusing to find validity in Appellant's patent when to the Court it represented, at best, mere *recognition* of claimed existing, but unperceived advantages in old bearing structures.

APPELLANT'S PATENT IS ALSO INVALID FOR FAILURE TO DESCRIBE AND CLAIM THE ALLEGED INVENTION WITH THE DETAIL AND PARTICULARITY REQUIRED BY THE PATENT STATUTES.

Among the grounds urged in support of Appellee's Motion for Judgment Notwithstanding Verdict was the proposition that the Stallman patent specification and claims do not describe and claim the alleged invention with the particularity required by the patent statutes (Tr. Vol. I, p. 15 (Item 1) pp. 19-20, Items 3(c) and 3(c)(1). The District Court, while recognizing merit in these contentions, did not

reach them in view of its conclusion that Appellant's patent is invalid for lack of invention (Tr. Vol. I, pp. 31-32).

This proposition is again urged as an added ground for affirmance of the judgment n.o.v. since it also spells out invalidity of the patent in suit.

Appellant's Opening Brief (pp. 4 and 6) purports to describe the Stallman invention, but it is significant that the patent itself is not cited or called upon to substantiate the description. The reason is plain. The Stallman patent does *not* contain a description in its specification matching or even supporting the characterization given in the brief.

Thus the assertion (Brief p. 4) that Stallman "invented the solution for this long vexing problem by providing a guide ring or rail on the *stationary* race of the bearing", is not borne out by the patent specification (Tr. Vol. II, pp. 287-288) which is devoid of criticality in the placement of the guide ring or rib on the stationary race. On the contrary, Stallman merely states a *preference* for such placement of the guide rib or ring (Tr. Vol. II, p. 288, Col. 1, lines 26-32) without explaining why this is so. Similarly, the idea of *space* to "permit *skewing* of the roller when subjected to unbalanced forces", the correction of "*skewing*" and the prevention of "the locking of such bearing as a result of excessive *skewing*", set forth in appellant's Opening Brief (p. 4) are figments of the imagination of the patentee long after the grant, since there is not one single reference to skewing or the so-called use of "skewing forces" in the specification of the Letters Patent in suit. Stallman instead speaks of "misalignment" and how he thought it was corrected (Tr. Vol. II, page 288, column 2, lines 7-50), but in so doing he was unwittingly, or otherwise restating the teachings clearly set forth in the British patent to Zahn (Tr. Vol. II, 292, lines 19-34 and Fig. 1).

True enough, the Stallman patent drawings show spaces between the parts, but similar spaces which would permit skewing of the roller are provided in the prior art patents hereinabove discussed or could be provided therein through the exercise of mere mechanical skill, and in this particular the Stallman device may not be and is not distinguished from those teachings.

The description attempted at pp. 6-7 of Appellant's Brief is equally at variance with the meager recitals of the patent specification.

In these respects the specification of the Stallman patent *failed* to contain the:

“ * * * written description of the invention, and the manner and process of making it, in such full, clear, concise, and exact terms * * *

and it failed also to:

“ * * * set forth the best mode contemplated by the inventor of carrying out his invention. * * * ”

as required by 35 U.S.C. §112.

Instead, the specification merely sets forth a general description of the parts of the several species of bearings (i.e., Fig. 1 wherein the guide rib is a ring 15 inserted into the outer race 10 and having a portion projecting into the reduced neck 14 of the roller 12; Fig. 2 wherein the ring 15 is inserted in the inner race 11; Fig. 4 wherein the guide rib 18 is integral with the outer race 10 and Fig. 5 wherein two guide ribs 20 are integral with the outer race).

From this the specification progresses to a brief discussion (Tr. Vol. II, p. 288, Col. 2, lines 30-50) of misalignment of one of the rollers 12 shown in Fig. 7 and a prophetic statement concerning the “tendency” of such misaligned bearing.

But nowhere in the specification of Stallman is there a detailed description or statement of why or how it is that the placement of the guide rib or rail on the stationary race or bearing member contributes in any fashion to the correction of misalignment of the rollers. Nor does the specification set forth that the relative dimensioning of parts or the clearances for parts contribute in any way to the accomplishment of the purpose now claimed for the invention. Thus the Stallman specification might well be taken as a description of the prior art devices of Heim, Kempster or Zahn and in that sense it fails to comply with the Statute.

Moreover, the claims of the patent do not and, of course, cannot cure this fatal defect in the Stallman specification. It is true that Claims 1 to 8, inclusive, specify the placement of the guide rib or ring on the stationary race, but this characterizing language was added to the claims by amendment during prosecution of the application. This was obviously "new matter" unsupported by the specification or a new oath. But the claims, like the specification, do not allude to the asserted skewing correction function of the central guide rib or that this function depends upon the placement on the race which will be stationary when the bearing is in operation.

Appellant's patent is, for these reasons, doubly vulnerable to invalidation for failure to comply with 35 U.S.C. 112, since the presently asserted "invention" finds no antecedent in either the specifications or the claims of the patent. Hence Appellant is far worse off than was the patentee in *Winslow Engineering Company v. Leroy R. Smith*, *supra*, for there the specification described the invention but it was not defined in the claims. It will be remembered that in the cited case this Court found invention present in the Oil Filter, but regarded *Graver Mfg. Co.*

v. Linde, 336 U.S. 271, 277, as compelling it to hold the claims invalid for failure to satisfy the old statute (35 U.S.C. 33) or the new (35 U.S.C. 112) and the latter because the patent did not conclude with claims "particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention".

It is respectfully submitted that the underlying rule of the *Winslow* case is equally applicable to the patent in suit.

McGILL IS NOT A PARTY TO THE ACTION

As noted in the opening portion of this brief, McGill Manufacturing Company is not a party to this controversy, the action having been dismissed as to it by Order of August 9, 1954.

It is, therefore, somewhat surprising to see that Appellant has devoted a considerable portion of his Factual Statement (Opening Brief pp. 4-5) to what McGill did or did not do. One can only surmise that the recitals are for the purpose of leading the reader to ponder whether McGill was guilty of some inequitable conduct toward Appellant. If that was the purpose, it need only be noted that when the full record is examined it will reveal that McGill acted in a perfectly straightforward manner toward Stallman in its dealings, terminating them when its patent counsel advised that the patent was, as the District Court subsequently held, invalid.

If on the other hand, the recitals are to be the basis of an argument that there has been some commercial success with the Stallman bearing through the efforts of McGill, then the Court need only be reminded that no showing of commercial success, in whatever degree, will vitalize a clearly invalid patent. It cannot fill the void where invention is plainly lacking.

Jungerson v. Ostby & Barton Co., 335 US 560, 80 USPQ 32;

Fernandez v. Phillips, 136 F(2d) 404, 58 USPQ 47 (CA 9);

Photochart v. Photo Patrol, Inc., 189 F(2d) 625, 90 USPQ 46.

CONCLUSION

The conclusion of the Court below as to invalidity of the patent in suit was based upon a record demonstrating lack of patentability in the subject matter beyond any reasonable doubt. The record contained not only the patent in suit, the prior art patents cited by the Patent Office during prosecution of the Stallman application, but additional, pertinent prior patents that were *not* cited during such prosecution and the patentee's own characterization of his concept, recited in such terms and with such definiteness as to make a finding of invalidity inescapable.

It being the "right and duty" of the trial judge to enter a judgment n.o.v. where it appears there is a clear-cut case of lack of invention, it is abundantly clear that this was an appropriate case for the exercise of this power.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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No. 15,328

United States Court of Appeals
For the Ninth Circuit

RALPH F. STALLMAN,

Appellant,

VS.

CASEY BEARING COMPANY, INC., a corporation, and T. W. CROSBY,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The arguments of appellee in its brief were in the main anticipated and answered in appellant's opening brief. It seems necessary, however, to comment upon certain phases of appellee's argument in order to further clarify the issues. Therefore, if in order to avoid repetition, appellant does not answer some point or argument of appellee, it is to be understood that appellant does not thereby intend to concede the correctness of appellee's such point or argument or reasoning.

A JURY VERDICT IN PATENT CASES IS ENTITLED TO THE SAME CONSIDERATION AS JURY VERDICTS IN OTHER CIVIL CASES.

Appellant in his opening brief endeavored to frame the issues in the light of general rules applicable to

directed verdicts and judgments notwithstanding the verdict (Appellant's Opening Brief, pages 9 to 12), and appellee's charge on pages 3 to 7 of appellee's brief that appellant places a "halo around the jury's verdict in every patent case" is incorrect.

Appellant has no quarrel with the rules of the cases cited by appellee in its argument. Namely, appellant does not question the right of the trial Court to set aside the finding of a jury "*if there are no grounds for the verdict*" (*Hansen v. Safeway Stores, Inc.*, 238 F. 2d 336).

But, as summarized in Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Vol. 2, pp. 774-775:

"The Court has power to enter judgment notwithstanding the verdict *only for one reason*—the absence of *any* substantial evidence to support the verdict. Obviously then a judgment n.o.v. should not be entered if the evidence is sufficient to present a jury question or if the verdict is supported by substantial evidence." (Emphasis ours.)

In considering the evidence in the instant case the general rule also applies that "all facts which plaintiff's evidence reasonably tends to prove and all favorable inferences fairly deducible from those facts, *must be* assumed in support of the verdict" (5 Moore's Federal Practice Sec. 50.13, 2346).

Hence appellee's argument that "here there was abundant evidence of prior art or anticipation sufficient to take the case out of the province of the jury"

does not correctly reflect the applicable rules of law. Appellee reaches such conclusion by assuming all inferences against the verdict and none in support of the verdict.

Appellee's discussion of a "double standard" for testing the invention is meaningless in this case, especially when appellee does not anywhere quote any standard it may have in mind. Appellant contends that the standard for testing the invention was stated in the Court's instruction to the jury (quoted on page 9 of appellant's opening brief), and the differences in the instant case are not in the standards applied but simply that the jury drew inferences from the evidence favorable to plaintiff, while the Court and appellee resolve all inferences against the plaintiff and against the verdict of the jury.

Even if the prior art could be interpreted in two different ways, particularly as to function and mode of operation, all inferences must be drawn in favor of the verdict and not against the verdict as contended by appellee.

THE PRIOR ART AND THE PATENT IN SUIT SHOULD BE INTERPRETED IN THE LIGHT OF FUNCTION AND MODE OF OPERATION.

Appellee on pages 7 to 15 of its brief directs its arguments to pointing out physical similarities between the Stallman patent and the prior patents. Of course there are such similarities and the jury was well instructed as to those. All these patents pertain

to roller bearings. All contain an inner and an outer race and rollers between.

The prior art attempted to remedy the defect of such roller bearings apparently unsuccessfully since 1897. However, nowhere in appellee's brief is it suggested that any of the alleged prior patents perform or are capable of performing, the functions of the Stallman patent and by the same mode of operation, unless changed from what they are.

The Stallman patent solves the problem of excessive friction due to "misalignment" or "skewing" by "self-correction," as shown in Fig. 7 of the Stallman drawings and described in the Stallman patent (Vol. II, p. 288, second column, lines 30-50). None of the prior patents solve this problem in any similar manner. Appellee, therefore, limits its argument to enumeration of physical elements of prior bearings and then suggests that such prior elements could be reorganized in imitation of the Stallman invention. This, of course, is the "hindsight" rule discussed on page 20 of appellant's opening brief.

KEMPSTER PATENT NO. 585,580.

Appellee apparently does not argue that this Kempster patent can be interpreted in favor of the verdict as on pages 14 and 15 of appellant's opening brief, but appellee argues that if the spacer rollers were omitted from this Kempster patent, it could function like the Stallman invention. In this appellee disre-

gards the statement in this Kempster patent to the effect that the rolls are held by "direct contact of the central grooves of the rolls with the rigid annular projecting rib" (Vol. II, p. 296, lines 52-55). Therefore, as explained in our opening brief, Kempster cannot perform the repeated self-correction in the manner of the Stallman bearing. At any rate, the modifications of this Kempster patent are without any suggestion from this Kempster patent and constitute a theoretical reconstruction of this Kempster patent.

Defendant's expert endeavored to demonstrate such modified structure to the jury, but on cross-examination had to admit that it was a theoretical design and he did not know of anyone who made one like it (Vol. II, pp. 246-249).

Thus the jury had opportunity to observe demonstrations and explanations and drew the inference that the modifications and changes of this Kempster patent suggested by appellee's expert were not feasible and not obvious to the man skilled in the art. While appellee and the District Court may draw some other far-fetched inferences from this patent, it cannot be successfully argued by plaintiff that there is no evidence to support the verdict.

KEMPSTER PATENT NO. 747,324.

Appellee in its argument concedes that this Kempster patent is predicated on the use of two guide ribs in the bearing one on the inside race and the other at the outside race.

The District Court erroneously held that this Kempster patent in two of the Figures showed only one guide rib. Thus at least there is agreement on the Court's misunderstanding of this patent.

Appellee tries to rectify this by the argument that one of the guide rings would be the primary guide rib and the effect of the other would be negligible. That is not what Kempster taught, and appellee has no fact or evidence on which such theory could be based. This is simply another inference drawn against the verdict and it is untenable.

THE ZAHN BRITISH PATENT NO. 17,841.

Zahn did not illustrate and describe the principle of the Stallman patent. Zahn provided a flange on each end of the roller outside of the actual bearing surface which flanges extend over and beyond the edges of the race.

This point will be best illustrated by quoting the part of the Zahn specification, which describes Fig. 1 of the Zahn drawing:

“Referring to Fig. 1, the roller a rolls between the lower bearing member b and the upper bearing member c, which have a relative longitudinal movements, the upper member, for example, moving in the direction of the arrow. The roller is provided with flanges d at its ends which extend over the edges or shoulder 9 of the bearing member b and run clear of said edges in normal operation” (Vol. II, p. 292, lines 19 to 23).

Then Zahn specifies as to a modified form where the end flanges run along track rings:

“It is essential to the operation according to the above described paragraph that the clearance at the outer side or shoulder of the track rings g should be less than that at the inner side thereof, so that whenever frictional engagement takes place, it will be at the outer side” (Vol. II, p. 293, lines 10-15).

This British patent tried to solve the vexing problem in 1906 by end flanges and tracks outside of the bearing surface proper. Apparently the trial Court recognized this and therefore did not rely on this patent in setting aside the verdict of the jury.

THE HEIM PATENT.

Appellee argues that because Heim did not expressly disclaim use of a guide rib on the stationary race, hence the inference should be that Heim taught such combination. Also appellee in effect argues that because there were in the prior art some rollers somewhat loose on a guide rail, it should be inferred that the Heim patent could be changed from its expressed tight engagement between the rib and groove without invention. But appellee overlooks that such changes would be in direct conflict with the express teaching and inventive concept of Heim, and that the bearing of the Heim patent without such changes could not perform the functions of the bearing of the Stallman patent.

**THE STALLMAN CONCEPT IS DESCRIBED AND CLAIMED
IN THE STALLMAN PATENT.**

Appellee's attitude in its argument is self-contradictory. Appellee takes all sorts of liberties with the prior art patents by changing, reconstructing and remodeling them, but on pages 15 to 21 and 24 to 28 of its brief appellee takes exception even to the use of synonyms in describing the concept of the Stallman patent. Of course, appellee is consistent in its attitude of insisting on resolving all inferences against the verdict of the jury.

The term "misalignment" in the Stallman patent is used synonymously with "skewing." The unbalanced forces on the misaligned (or skewed) rollers are described in terms of leverages in the Stallman patent. The Stallman patent describes the ultimate function and operation of the claimed bearing.

The Stallman patent states:

"A further object of the invention is the provision of a needle type bearing in which the thrust action set up by *misalignment* of the needles is minimized and is *self-correcting* through the roll action of the bearing" (Vol. II, p. 287, second column, lines 6-10).

Then:

"In Fig. 2 the assembly shown is the same as that shown in Fig. 1 with the exception of the positions of the rings 15 and 16, which have been reversed. In this figure the ring 15 is received by a groove in the outer periphery of the inner race 11 and the ring 16 serves to hold the needles in place against the inner race when the outer race

is removed. The construction illustrated in Fig. 1 is preferable where the bearing is used on a revolving shaft and the construction of Fig. 2 is preferred where the shaft is stationary and a member carried by the outer race of the bearing revolves. In both cases, the theory of operation of the bearing is identical" (Vol. II, p. 288, column 1, lines 19 to 33).

If the words "preferable" or "preferred" were omitted from the above sentence, the sole premise for appellee's entire argument fails and the description of the claimed feature of the guide rib on the stationary race would become sufficient. This certainly would be a flimsy premise for holding a patent invalid in the face of a jury verdict of validity.

Then the Stallman patent specifies:

"Referring now to Fig. 7 wherein three needle rolls constructed in accordance with the present invention, are diagrammatically illustrated, the central needle roll has assumed the same *misaligned* position and has come into *frictional* engagement with the ring 15 at the point a. The needle rolls are in this case also rolling in the direction of the arrow b, but the force which tends toward misalignment takes place only between the point a and the left hand end of the needle. This is less than one-half the length of the needle. On the other hand, the *force tending to correct this misalignment, or advance the retarding position* of the needle takes place between the point a and the right hand end of the needle which is more than one-half its length. Consequently, the tendency in normal operation of the bearing is for

the misaligned needle to assume proper alignment rather than to increase its angularity and transmit the same to all of the needles in the bearing."

We submit that if the words "skewing" and "skewed" are respectively substituted for the words "misalignment" and "misaligned" in the above quoted paragraph, then the premise for appellee's argument on the insufficiency of disclosure fails completely. The above quoted paragraph of the Stallman patent, taken with Fig. 7 of the drawing, which shows the roller in misaligned (skewed) position, is sufficient explanation of the Stallman invention for a man skilled in the art.

The description contained in appellant's opening brief describes the same invention substantially in the same terms and in terminology evolved by the experts and the Court during the trial and is predicated on the record.

Appellee's criticism of the claims of the Stallman patent is untenable on the grounds and quotations above set forth. Claim 3 distinguishes from Heim in that it specifies the "relatively stationary *outer* race," and the ring "on the outer race," neither being present in the Heim patent.

Claim 4 specifies the "means carried by the *stationary* race *only* and engageable with the rolls *intermediate* their ends in the event they become *misaligned* with their normal positions."

Claim 5 specifies "means carried by the *stationary* race *only* and projecting into the reduced portions of

the rolls to engage *shoulders* formed by said reduced portions in the event of *misalignment* of the rolls.”

Claim 9 specifies: “a ring carried by the *outer* race and registering within the reduced portions of the rolls to engage the rolls in the event they become *misaligned* with their normal position.”

If the word “skewed” is substituted for “misaligned” in these claims the main premise for appellee’s argument against the claims fails, because there is no authority that requires a claim to be so functional as to describe in detail the interaction of forces when the elements of the combination coact and function in a manner set forth in the claims.

Appellee, therefore, interprets the Stallman patent in its own way. Appellee overlooks the well established rules that patents “under the fair application of the rules, *ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor” (Walker on Patents, Deller’s Edition, Vol. II, pp. 1205-1206); “Nor is a patent void on the ground that the principle of the invention is not fully understood; or if understood by anyone, not understood alike by all . . .” (Walker on Patents, *supra*, p. 1228).

CREDIBILITY OF DEFENDANT’S WITNESS.

Appellee on page 22 of its brief recognizes that this case cannot be judged in the abstract by theorizing about what a prior patent could or could not do if

changed or modified so appellee relies on evidence which appellee terms "uncontroverted." Doubt was cast upon the exhibits and the testimony of Mr. Hoffman, to which appellee refers regarding multiple bearing units during his cross-examination (Vol. II, pp. 142-145). Furthermore, that testimony was also rebutted in important part on rebuttal testimony (Vol. II, p. 259). Weighing and evaluating the credibility of this witness and of defendant's expert and his experiments, are clearly the function of the jury.

OBVIOUSNESS.

Applying the "obviousness" test to specific cases, it must be observed that the cases where it is most difficult to say that the invention would have been obvious to those skilled in the art, are those cases in which the evidence clearly shows that those most skilled in the art have sought a solution to a particular and perplexing problem for many years, but have been without success until the discovery of the patentee (The Georgetown Law Journal, Vol. 44, page 119).

Appellee's argument and the trial Court's opinion demonstrate that men skilled in the art concerned themselves with this problem since 1896. The evidence before the jury showed that prior to Stallman such attempts were impractical (Vol. I, pp. 172, 173, 188, 219-222, 227, 241 to 251).

Appellee's expert, a professor, and an author of a book on machine design (Vol. I, p. 153) conceded that

the problem existed (Vol. I, p. 165) and that he did not know of a solution for it prior to the time he was informed of the Stallman invention (Vol. I, p. 228).

Appellee's president, long in the bearing business, recognized the value of Stallman's discovery (Vol. I, pp. 110, 111). McGill Company paid royalty on it (Vol. I, p. 68). Both announced the Stallman discovery to the trade as "revolutionary."

The trial Court in treating with the Stallman discovery disregarded its environment, the problems it solved, the previous attempts for half a century, and the ultimate success after Stallman's discovery, and decided the case on three prior patents because those patents in the abstract superficially looked like the Stallman bearing. Then the Court disregarded the fact that neither of those prior art bearings could perform similarly to the Stallman beading unless the prior art was changed in the light of the Stallman discovery.

Such consideration of the patent is erroneous. It is true that the patent is a very narrow one in a crowded art, but it is not unprecedented that upon proper consideration of all factors such patent is valid.

In *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 279, 64 S. Ct. 593, 88 L. Ed. 721, 724, the Supreme Court held:

"Viewed after the event, the means Anthony adopted seem simple and such as should have been obvious to those who worked in the field, but this is not enough to negative invention. During

a period of half a century, in which the use of flashlight batteries increased enormously and the manufacturers of flashlight cells were conscious of the defects in them, no one devised a method of curing such defects. Once the method was discovered, it commended itself to the public as evidenced by marked commercial success. These factors were entitled to weight in determining whether the improvement amounted to invention and should, in a close case, tip the scales in favor of patentability.”

The Court in the instant case instructed the jury as in *Oxnard Cannery v. Bradley*, 194 F. 2d 655, wherein on appeal this Honorable Court ruled:

“Appellants’ first specification of error lies in the contention that there was no evidence to support the verdict of the jury on the issues of validity and infringement. In testing the sufficiency of evidence to sustain a verdict in favor of plaintiff, the evidence and all reasonable inferences deducible therefrom must be considered in the light most favorable to plaintiff and any conflict in the evidence must be resolved in favor of the jury’s findings. Where a jury, under instructions against which no complaint is made, finds for the plaintiff, the plaintiff is entitled on appeal to have considered as true all evidence which was offered upon controlling issues and were entitled to all inferences reasonably to be drawn therefrom. *Zarek v. Fredericks*, 3 Cir., 138 F. 2d 689, affirming D.C., 49 F. Supp. 65.”

and then:

“It is too late in the proceedings for appellants to here urge that these matters should have been

determined by the Court. No such contention was advanced below and no exceptions were taken to the instructions of the Court submitting these questions to the jury. In effect, appellants would have this Court substitute itself for the jury by re-evaluating the evidence. This Court has previously held that issues of the character here presented are questions of fact. See *Faulkner v. Gibbs*, 170 F. 2d 34; *Id.*, 338 U.S. 267, 70 S. Ct. 25, 94 L. Ed. 62 and cases cited therein.”

“In addition to the foregoing conditions, appellants also argue that the claim in suit is void not only because all the elements of the claim are old, but also because the claim embodies in conjunction several distinct units of invention. This fact question was properly resolved by the jury under appropriate instructions which contained a minimum of technical verbiage, and were marked by succinctness and lucidity. No objection was taken to any of the instructions, so we are not compelled, at this late stage, to consider any error occurring therein. The jury’s verdict was supported by substantial evidence and was not clearly erroneous.”

We submit that in testing the sufficiency of evidence to sustain the verdict in favor of the Stallman patent, the evidence in the instant case and all reasonable inferences deducible therefrom must be considered in the light most favorable to plaintiff and any conflict in the evidence must be resolved in favor of the jury’s findings.

CONCLUSION.

Appellant, therefore, respectfully urges this Honorable Court to view the Stallman patent in its proper historic aspect, as the first practical solution of an evidently long vexing problem and in interpreting the prior art and the Stallman patent draw all inferences and intendments in favor of the verdict that the Stallman discovery was at the time of his invention unobvious to a man skilled in the art and the patent in suit is valid.

We respectfully submit that the judgment notwithstanding the verdict be reversed and the jury's verdict reinstated.

Dated: San Francisco, California, .

April 8, 1957.

Respectfully submitted,

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No. 15331.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUAN GUTIERREZ-SOSA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Statement of Jurisdiction.

On January 19, 1956, appellant filed in the United States District Court for the Southern District of California a Complaint for Judicial Review and Injunction. [Tr. 2-15.]* On February 7, 1956, a Temporary Restraining Order previously issued was discharged and injunctive relief denied. [Tr. 14.] On February 9, 1956, an Answer to the Complaint was filed by appellee. [Tr. 11-13.]

On April 10, 1956, the case was tried before the Honorable William M. Byrne, and on July 2, 1956, the relief prayed for in the Complaint was denied and judgment rendered in favor of the defendant. [Tr. 15-17.]

*Tr. will refer to the Clerk's Transcript of Record.

The District Court had jurisdiction pursuant to the provisions of Title 8, United States Code, §§1254(e), 1329, and Title 5, United States Code, §1009.

This Court has jurisdiction of the appeal pursuant to the provisions of Title 28, United States Code, §1291, and Rules 73 and 75 of the Federal Rules of Civil Procedure, Title 28, United States Code.

Statement of the Case.

Appellant is a Mexican alien who illegally entered the United States on or about April 20, 1951. [Tr. 15.] On July 14, 1954, a warrant for his arrest was issued by the Immigration and Naturalization Service, charging that he was subject to deportation under 8 U. S. C. §1251(a)(2), in that he had entered the United States without inspection. A deportation hearing upon such charge was held at Los Angeles, California, on April 8, 1955, at which time appellant was held deportable. [Tr. 16.] This particular aspect of the decision is not in controversy, as appellant concedes deportability. [Tr. 26; App. Br. p. 3.]

Pursuant to the provisions of 8 U. S. C. §1254(e), appellant applied in said hearing for discretionary relief which would allow him to depart voluntarily from this country. Said code section requires that an alien so applying, must “establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure. . . .” However, 8 U. S. C. §1101(f) provides:

“No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

“(2) one who during such period has committed adultery.”

The Special Inquiry Officer found that adultery had been committed by appellant during the five-year period. [Tr. 14b.] Appellant married one Maria Cervantes in 1947. [Tr. 14n.] In 1950, he commenced living with Celia Aguilar in Los Angeles as man and wife, and continued to do so without benefit of ceremony until June 19, 1954, at which time he entered into an invalid marriage with her. On September 2, 1955, appellant divorced in Mexico Marie Cervantes. On October 24, 1955, he entered into a valid ceremonial marriage with Celia Aguilar. [Tr. 14n.]

Because of the determination of adultery, the Special Inquiry Officer found that §1101(f)(2) “precluded the finding of good moral character,” and that, therefore, appellant was “not statutorily eligible for voluntary departure . . .” [Ex. A, Discussion of October 31, 1955, pp. 2-3.] In view of the foregoing language, it probably should be presumed that the only reason for the Officer’s finding of bad character was because he thought §1101(f)(2) was applicable; that no determination of character was made on the merits; and that if §1101(f)(2) is inapplicable to this case, the Officer might have been persuaded to find good moral character.

Appellant’s contention was then, and is now on appeal, that the question of good moral character should not be determined by §1101(f)(2), which became effective on December 24, 1952 as part of the Immigration and Nationality Act of 1952, but by the pre-1952 law. The old statute, 8 U. S. C. §155(c), required proof of good moral character for five years, but it contained no *mandatory* finding of bad moral character by reason of an alien’s

adultery within the period. Thus, under the old law, an adulterous alien had the right to *persuade* the Attorney General of his good moral character; *i.e.*, adultery would not have been *conclusive* of bad moral character. See *Petitions of Rudder*, 159 F. 2d 695 (C. C. A. 2, 1947); *Application of Murra*, 178 F. 2d 670 (C. A. 7, 1949). Under the new law, a finding of adultery precludes a finding of good moral character. Appellant reasons that since before the 1952 Act he would have had a right to have his conduct determined by the pre-1952 standards, this was a "right" or "status" within the meaning of the Savings Clause of the Act, 8 U. S. C. §101 note, and that the Savings Clause preserves his "right" under the old law. The Savings Clause (§405(a)) of the Act, as applicable here, reads:

"Nothing contained in this Act . . . shall be construed to affect . . . any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such . . . statuses, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are . . . hereby continued in force and effect."

Appellant appealed the Special Inquiry Officer's ruling to the Board of Immigration Appeals [Tr. 16], which affirmed the lower decision. A Complaint for Judicial Review was brought in the United States District Court, in which case relief was denied and judgment rendered against appellant, from which judgment he appeals to this Court.

ARGUMENT.

I.

Appellant Acquired No Right Prior to the 1952 Act and Therefore Had Nothing Which the Savings Clause Could Preserve.

Appellant's contention first should be clearly stated. Point I in his brief, and the only point, is that "The Status He Had Entered Into With the Woman He Subsequently Married Was a Condition Which Existed When the Act Went Into Effect on December 24, 1952." As stated, the status to which appellant refers is adultery, and not an immigration status, for he speaks of entering into that status with the woman now his wife. The Savings Clause does not save nor the 1952 Act take away any such status or condition of adultery from appellant. Appellant would probably agree that it is not the status of adultery that he wishes preserved. Instead, his contention must be that before the 1952 Act, he would have had the right to attempt to prove his good moral character, in spite of admitted adultery. The 1952 Act, particularly §1101(f)(2), mandatorily requires a finding of bad moral character if it is established that the alien during the five-year period has committed adultery. Therefore, the right contended to be preserved by the Savings Clause is the right to prove good character on the merits, unhampered by the rigid definition thereof in the new Act.

If such a right existed, it must have had a beginning. Yet appellant does not enlighten us as to how that right or status sprang into existence. No action was taken by him whatsoever to make legal his immigration status from the time he illegally entered the country in April, 1951, until the hearing in April, 1955. True enough, *if* appellant had been apprehended, and *if* he had been declared

deportable, and *if* he had applied for voluntary departure, then he would have been eligible to prove his good character. But the simple fact remains, none of these conditions occurred. Therefore, if appellant had a right to prove good moral character prior to the 1952 Act, then it must have arisen merely because of his illegal presence in the United States. The Trial Judge stated that this would be akin to determining the basis of a person's eligibility for parole prior to the time he was imprisoned. [Tr. 45-47.] Therefore, it was held that appellant could not have had a right to have discretion exercised as to voluntary departure until there was a finding of deportability. [*Ibid.*]

The cases support the Judge's reasoning. It is true that Courts have recognized that a right to have good moral character determined by pre-1952 standards can be preserved by the Savings Clause. Nevertheless, in such cases, some determination by the Attorney General under the old law was possible. In *United States v. Shaughnessy*, 221 F. 2d 578 (C. A. 2, 1955), an admittedly deportable alien applied for voluntary departure in 1953, and again in 1954 under 8 U. S. C. §1254(e), and, as in the instant case, the application was denied as a matter of law because the alien's commission of adultery precluded, under §1101(f)(2), a finding of good moral character. The Court of Appeals reversed, holding that the Savings Clause operated so as to force the Attorney General to determine good character under the pre-1952 standards. The *Shaughnessy* case, however, was bottomed on the fact that a petition for an immigration visa had been filed on the alien's behalf "more than three months before December 24, 1952, when the new legislation went into effect." (*Ibid.*, p. 579.) The language of the opinion indicates that the alien had a preserved immigration status

only because there was some action the immigration authorities could have taken under the old law:

“We turn then to the crucial question of the applicability of 8 U. S. C. §1101(f)(2) to Zacharias. Did the *filing of the petition* for issuance of an immigration visa by his American wife give Zacharias ‘any status, condition, right in process of acquisition . . . done or existing,’ at the time the 1952 Act went into effect?

* * * * *

“We conclude that the *preliminary application* for the visa in September, 1952, was sufficient to bring Zacharias within §405(a). This application was the first step in his effort to attain a legal status in this country . . . Zacharias’ subsequent request for voluntary departure . . . *was squarely based on this visa application and should be considered to relate back to it.*” [Emphasis added.]

Since the instant appellant cannot “relate back” his request for voluntary departure to any previous action, the *Shaughnessy* case is no authority for his position. A District Court case, not cited by appellant, *Petitions of F. G. and E. E. G.*, 137 F. Supp. 782 (D. C. N. Y., 1956), likewise held, with respect to a petition for naturalization, that the two petitioners were entitled to a determination of good moral character, and that the rigid standard of §1101(f)(2) could not be used to preclude arbitrarily a finding of such character. In that case, both petitioners had been admitted for lawful permanent residence before 1952, but they had committed adultery with each other during the requisite five-year period. The Court’s holding that petitioners had a right in process of acquisition was based upon the fact that petitioners had a lawful immigration status which would have entitled them to be natural-

ized after the lapse of a five-year period, assuming good character requirements could have been met.

“. . . the male petitioner's *admission for permanent residence* in 1947, and the female petitioner's *admission for permanent residence* in 1908, gave them, so far as naturalization was concerned, a 'right in process of acquisition' at the time of the passage of the 1952 Act, and . . . their status as persons of good moral character must be governed by the standard which was in effect prior to the enactment of the definition of good moral character incorporated in the 1952 Act." [Emphasis added.]

If the 1952 legislation had not been passed in that case, the petitioners therein automatically would have been eligible for naturalization if they could have proven good moral character, but the rigid definition thereof in §1101-(f)(2) changed their status. In contrast to that situation, the instant appellant never would have had the right to prove his character until he was apprehended; this "inchoate right" in no way could have been ripened by the mere passage of time. Consequently, the 1952 Act did not affect appellant, and as the Supreme Court said, in *Shomberg v. United States*, 348 U. S. 540, 546 (1955):

"If . . . nothing in the new Act *affects* petitioner . . . it is clear that rights under the savings clause have not been infringed . . . Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play." [Emphasis theirs.]

Instances of the operation of the Savings Clause other than with respect to §1101(f)(2) are contained in many cases. All such cases make clear that the alien had or would have had acquired some immigration status by reason of some prior action or non-action.

In *United States v. Menasche*, 348 U. S. 528 (1955), the alien had "filed his declaration of intention to become an American citizen before the effective date of the 1952 Act and [had] otherwise complied with the naturalization laws then in effect." (*Ibid.*, pp. 529-530.) The Court then went on to note the historical importance of such a declaration in naturalization procedure. (*Id.*, p. 531.) It also stated that its decision could have rested upon the fact that the alien had obtained lawful permanent residence and thus would have been eligible for naturalization had it not been for the new residence requirements of the 1952 Act. (*Id.*, pp. 530, 536.) In either event, a lawful immigration status had been obtained by Menasche prior to the 1952 Act.

In *Shomberg v. United States*, 348 U. S. 540 (1955), the alien acquired a protected status by reason of "the filing of his Form N-400, from his petition for naturalization, and, perhaps, from his fulfilment of the five-year residence requirement." (*Ibid.*, p. 543.)

In *United States v. Kershner*, 228 F. 2d 142 (C. A. 6, 1955), the alien had entered the United States as a stowaway, had remained here for more than five years, and had acquired the status of being "immune from deportation on the stowaway charge under then existing law." With respect to deportation on another ground, namely, the conviction of two separate crimes involving moral turpitude, the Court held that the alien had acquired a similarly immune status by reason of an executive pardon of one of such offenses prior to the 1952 Act.

In *United States v. O'Rourke*, 213 F. 2d 759 (C. A. 8, 1954), a similar situation existed as to a pre-1952 pardon of a narcotics offense.

In *Shintaro Miyagi v. Brownell*, 227 F. 2d 33 (C. A. D. C., 1955), the deportation proceedings were begun in 1945, long before the Act became effective.

In *Yanish v. Barber*, 211 F. 2d 467 (C. A. 9, 1954), a specific court order with respect to bail had been made prior to the 1952 Act.

In *Petition of Pringle*, 122 F. Supp. 90 (D. C. Va., 1953), an application for naturalization had been made on October 7, 1952.

Other examples may be found, but the foregoing is indicative of the fact that the instant appellant did not acquire a right to have pre-1952 standards of moral character applied to him in 1955, merely because he successfully avoided apprehension before the Immigration and Nationality Act took effect.

II.

The Savings Clause Can Preserve Rights Only With Respect to Conduct Prior to the 1952 Act.

As previously stated, appellant's adultery began in 1950 and continued until the divorce from his first wife in September, 1955. The Special Inquiry Officer based his finding that the appellant was statutorily ineligible for discretionary relief on the fact that "the respondent's extra marital relationship, between 1950 and 1954 was adulterous." [Ex. A, Discussion of Oct. 31, 1952, pp. 2-3.] The Board of Immigration Appeals affirmed the decision on the ground that "it was clear that the respondent had lived in an adulterous relationship . . . for several years prior to September 2, 1955." [Ex. A, Board of Immigration Appeals Decision, p. 2.]

The fact that appellant committed adultery after the effective date of the Immigration and Nationality Act,

December 24, 1952, makes immaterial any possible benefit appellant might have obtained by reason of the Savings Clause of such Act. Assuming, *arguendo*, that appellant's illegal presence in this country prior to passage of the Act vested him with a right to prove good moral character in a deportation hearing, the Savings Clause can only preserve such right as to his pre-December 24, 1952 conduct; it cannot operate as a blanket authorization to commit adultery after that date without incurring disadvantages as to which the Act specifically warns.

A status protected by the Savings Clause arises by reason of certain facts. In order that a status be in existence at the time the Act became effective (a specific condition precedent to the applicability of the Savings Clause), the facts must have occurred before December 24, 1952. If facts occur after that date, no status with respect thereto is in existence as of said date, obviously. In effect, the Savings Clause is remedial legislation against the operation of *ex post facto*-type laws in deportation proceedings. Cf. *United States v. Kershner*, 228 F. 2d 142, 145 (C. A. 6, 1955). Where the alien commits acts after the date of the Act, it cannot be said that the operation of the Act in any sense operates retroactively. Consequently, even assuming that the appellant had a certain status on December 24, 1952, then all that is "saved" is the right to have his pre-December 24, 1952 conduct determined by the old standards; his post-December 24, 1952 standards must be governed by those standards enacted by Congress. To do otherwise, would be to allow the shield of the Savings Clause to become a sword.

The situation may be likened to that where an alien, prior to 1952, had committed two offenses involving moral turpitude not arising out of a single scheme of criminal

conduct for which he had not been confined. Under the state of the law prior to 1952, the alien was not deportable. 8 U. S. C. §155. With the passage of the new legislation, the alien became deportable, unless the Savings Clause operated to preserve a status he may have achieved by the institution of immigration proceedings prior to the Act. In just such a case, the Supreme Court held that the alien would have had protected rights, had it not been for a specific provision to the contrary in the Act. *Shomberg v. United States*, 348 U. S. 540, 543 (1955). Assuming that no such specific provision existed, then, the alien's right to remain in the country would be protected by the Savings Clause. But suppose that in 1953, he committed two more such crimes. Would the Savings Clause protect his "status" so as to render him non-deportable despite his actions subsequent to the Act? In effect, that is exactly the precedent appellant is requesting this Court to make. For in the instant case, appellant's adultery not only occurred before, but after, the effective date of the Act. This being so, and the Special Inquiry Officer basing his finding on this fact, any beneficial status possibly achieved under the old legislation becomes completely immaterial. No status is achieved or saved with respect to post-1952 actions of the appellant.

It is significant to note that in the two cases in which the pre-1952 standards of good moral character were held preserved by the Savings Clause, *United States v. Shaughnessy*, 221 F. 2d 578, *supra*, and *Petition of F. G. and E. E. G.*, 137 F. Supp. 782, *supra*, the adultery in each had ceased prior to the effective date of the Act. In fact, in the latter case, the premise upon which petitioner's arguments were based was that:

"[T]he acts of adultery committed by them were all prior to April 7, 1952, and that, therefore, all

these acts were prior to the effective date of the Immigration and Nationality Act of 1952, which became effective December 24, 1952.” (*Ibid.*, p. 784.)

There are two District Court cases whose facts are even more similar to those of the instant case, and wherein the Courts applied §1101(f)(2), even though the aliens had been in the country before 1952. The possible operation of the Savings Clause was not mentioned, but this, in itself, may be significant as indicating its inapplicability.

The first case, *Evans v. Murff*, 135 F. Supp. 907 (D. C. Md., 1955), involved a stowaway who entered the United States in 1923 and whose illegal presence was not discovered until 1953. The Board of Immigration Appeals found that he had committed adultery for the past seven years. It was held, *inter alia*, that §1101(f)(2) was properly applied to the case. The Court was aware of the Savings Clause question that can arise in such situations, since *United States v. Shaughnessy*, *supra*, was not only cited, but quoted extensively on a point involving adultery.

In *Petition of Matura*, 142 F. Supp. 749 (D. C. N. Y., 1956), the alien entered as a stowaway in 1937 and achieved a lawful immigration status in 1946. Since 1944, he had been living in adultery with one Rose Longo. On August 13, 1955, the alien obtained a Mexican divorce from his first wife, and on November 18, 1955, lawfully married Rose Longo. On these facts, the Court held that §1101(f)(2) precluded a finding of good moral character. It should be pointed out that the facts in this case are stronger in favor of the alien there than in the instant case, since there, the alien had already achieved lawful residence in this country.

The substance of these two cases, then, is that §1101-(f)(2) is properly applied to post-1952 adultery even though similar conduct occurred before 1952. Where the adultery ceased before December 24, 1952, the question of good moral character should be determined in accordance with the standards existing before the new legislation. *United States v. Shaughnessy, supra; Petition of F. G. and E. E. G., supra.*

Conclusion.

Appellant acquired no right to a determination of good character preservable by the Savings Clause, because that determination could not have been made prior to the effective date of the Immigration and Nationality Act. Even assuming appellant acquired such a preserved right, §1101(f)(2) of the Act controls the determination of "good moral character" with respect to post-December 24, 1952 conduct. Since appellant's actions after such date admittedly fall within the proscription of §1101(f)(2), the action of the Special Inquiry Officer was proper, and the judgment of the District Court should be affirmed.

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No. 15332

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH N. LATTANZIO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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IN THE

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JOSEPH N. LATTANZIO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

I.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of the offense contained in a one count indictment which charged him with knowingly transporting a woman, namely, Ernestine M. Noland, in interstate commerce from Los Angeles County, California, within the Central Division of the Southern District of California, to Yerington, Nevada, for prostitution, debauchery and other immoral purposes, in violation of Title 18, Section 2421 of the United States Code.

The District Court had jurisdiction based upon Title 18, Section 3231, and this court has jurisdiction to entertain the appeal and review the judgment under the provisions of Title 28, Sections 1291 and 1294 of the United States Code.

II.

Statement of the Case.

Appellant was convicted in a one count indictment which charged him with a violation of Title 18, Section 2421 of the United States Code. This section is commonly referred to as the "White Slave Traffic Act."

The victim, Ernestine M. Noland, was known by several aliases including Teen Howard and Teen O'Neil. She worked as a prostitute at the Town House, Yerington, Nevada, under the name Lee Thornton on and after September 28, 1955. Ernestine M. Noland, alias Teen O'Neil, had been a prostitute. She was having disagreements or arguments with her "boy friend" with whom she was residing, and desired to resume the age-old profession.

On September 26, 1955, she went on a double date and during the course of the evening the four persons entered the Keynoter Bar located on Santa Monica Boulevard in Los Angeles, California. In the bar, Seymour L. Winston, and Henry Rose, the two men on said double date, spent most of their time entertaining the various patrons of the bar at the piano. The other girl, Kathleen Ray Stuart, remained at the bar. Ernestine M. Noland, hereinafter referred to as Teen, went up to appellant, asked him if he was Joe, stated she heard he is at the Town House and asked appellant how things are at the Town House [testimony of appellant, Tr. p. 139, lines 9 to 12, incl.]. Appellant and Teen then discussed what the girls were making per "trick" at the Town House, how much of the price per trick was received by the girl, the cost for room and board for the prostitute employed there and the percentage obtained on the drinks [Tr. pp. 79, 80 and 81]. Appellant, according to the testimony of the victim,

Teen [Tr. p. 83, lines 1 to 5 incl.], told her he would meet her the next morning, that he was going to Nevada and would take her to lunch. Appellant testified that he told Teen he was leaving the next morning, that he said he would call and he did telephone her the next morning before departing for Nevada [Tr. p. 140, line 25 *et seq.*; p. 141, lines 1 and 2]. Appellant testified on cross-examination, that on the night he met Teen in the Keynoter Bar, on September 26, 1955, he actually did not tell her that he would take her to lunch the following day and that in fact, he did not have her telephone number but that he believed he gave her his telephone number and she telephoned him the next morning at his parents home, concerning having lunch with him that day [Tr. p. 153, line 25 *et seq.*, and p. 154].

On the morning of September 27, 1955, the day after appellant and Teen met in the Keynoter Bar, Teen packed up and went to Yerington, Nevada. Her girl friend, Kathleen Ray Stuart was present that morning in the apartment which Teen occupied with Thomas D. Howard. Teen and Miss Stuart moved Teen's bags [Tr. p. 21, line 20], clothing on hangers, viz., a coat, jacket and dresses and a radio [Tr. p. 22, lines 5 to 10 incl.] into the automobile of Miss Stuart.

Teen and Miss Stuart went to the Office Bar, located on Vine Street in Hollywood, California [Tr. p. 22, line 23]. There they were joined by appellant [Tr. p. 23, lines 16 and 17]. Only general conversation ensued in the bar [p. 24, line 5]. Cf., Appellant testified to the contrary. He said that while in the Office Bar, Teen told him she was "having an awful beef" and would like to get away "and do you mind if it appears like I go with you?" [Tr.

pp. 156-158]. The three then walked out of the bar to the adjacent parking lot where appellant drove up his 1954 or 1955 blue or blue and white automobile and all three persons, including appellant, participated in the transfer of the aforesaid articles of Teen from the automobile of Miss Stuart into the car of appellant [Tr. p. 25, lines 9 to 14 incl.; also Tr. p. 24, lines 16 and 17].

In the parking lot, Miss Stuart was invited by appellant "to go along on a trip" and she said, "No, thank you, I like to stay in Los Angeles" [Tr. p. 26, lines 18 to 21 incl.]. It was stated in a "jesting manner" when appellant stated: "Why don't you come along on a trip, come along with us. I said (Miss Stuart) that I am perfectly happy where I am right now" [Tr. p. 27, lines 4 to 8 incl.]. Appellant also made a "jest" of the fact Miss Stuart's car was old and stated in substance: "Would you like to have a new car?" [Tr. p. 27, line 20]. There was nothing said by appellant or Teen to Miss Stuart concerning where they were going, but appellant did say something about coming along with them on a trip [Tr. p. 28, lines 13 to 17 incl.].

Miss Stuart observed the departure of her girl friend, Teen, with appellant [Tr. p. 29], and did not see her again for several months [Tr. p. 30, line 1].

After Teen and Miss Stuart had departed from the apartment of Teen and Thomas D. Howard, Mr. Howard walked to the vicinity of 1646 North Vine Street. He saw a man driving a Buick out of a parking lot. Mr. Howard could not say for sure that it was appellant but testified there was a resemblance [Tr. p 44, line 24]. He thought the woman in the car was Teen [p. 45, line 22].

According to the testimony of both Teen and appellant they proceeded from the parking lot on Vine Street to the Copper Cart in Los Angeles. Appellant left Teen in the Copper Cart while he went to visit his parents who lived a quarter of a block from the Copper Cart [Tr. p. 166, line 21]. Appellant returned to the Copper Cart and he and Teen had lunch and visited with several acquaintances of appellant [see Tr. p. 91].

After lunch, according to Teen, she telephoned a cab, got her bags and things out of the automobile of appellant, and departed [Tr. pp. 90 and 91].

Both Teen and appellant denied that appellant drove Teen from California to Nevada.

Teen testified that on the first day of her arrival at the Town House in Yerington, Nevada, she saw appellant there [Tr. p. 96, lines 8 to 13 incl.]. She further testified that she worked there as a prostitute [Tr. p. 96, lines 17 and 18].

After the termination of her employment at the Town House, Teen returned to Los Angeles. On or about February 10, 1956, subsequent to investigation by the government of the instant offense by appellant, Teen accidentally met appellant on a street in Hollywood, California. Appellant was accompanied by two other men [Tr. p. 97]. Ultimately, Teen testified that in the ensuing conversation, appellant "said he wasn't going to go to jail and if he did something would happen to me (meaning Teen)" [Tr. p. 109, lines 10 and 11].

Appellant testified that he left the Copper Cart in Los Angeles on September 27, 1955, about ten minutes after Teen departed [Tr. p. 145, line 17]. On the trip from Los Angeles to Yerington, Nevada, on September 27,

1955, appellant encountered an acquaintance named Ann Hawthorne [Tr. p. 170], a gas station attendant whom appellant knew [Tr. p. 171], and other persons appellant has known [Tr. p. 170].

Appellant departed from Los Angeles for Yerington, Nevada, at about 1:30 p.m., in the afternoon of September 27, 1955 [Tr. p. 171, lines 21 to 25 incl.]. He arrived not later than midnight that date [Tr. p. 146, line 25]. He made no stops on the way [Tr. p. 170, lines 5 and 6] except to obtain gasoline and to visit friends [Tr. p. 170].

Within one hour or an hour and a half after his arrival in Yerington, appellant saw Teen at the Town House [Tr. p. 173, lines 11 to 19 incl.].

III.

Statutes Involved.

Appellant was indicted for a violation of United States Code, Title 18, Section 2421 which provides in pertinent part as follows:

“Whoever knowingly transports in interstate . . . commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman . . . to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . .” shall be guilty of an offense.

IV.
ARGUMENT.

Appellant appeals from a conviction. He contends that the trial court erred in denying the motions of appellant for judgment of acquittal and committed prejudicial error in permitting the government to ask certain questions of appellant on cross-examination.

A.

The Denial of the Motion for Judgment of Acquittal by Appellant, After the Government Rested Its Case in Chief, Was Proper.

Defendant's motion for acquittal at the conclusion of the government's evidence presents a question as to the sufficiency of the evidence.

United States v. Perplies, 165 F. 2d 874.

"The purpose or intent in prosecution for transporting a woman in interstate commerce for immoral purpose may be proved by circumstantial evidence.
. . ."

Tedesco v. United States (9th Cir.), 118 F. 2d 737, 741.

Accord: *Aplin v. United States* (9th Cir.), 41 F. 2d 494, 496.

There was sufficient evidence of the guilt of appellant. A review of the evidence adduced at the trial, at the conclusion of the government's case discloses that the victim, Ernestine M. Noland, also known as Teen O'Neil, had been a prostitute. She was residing with but having arguments with her boyfriend, Thomas D. Howard. She met appellant in a bar in Los Angeles during the evening of

September 26, 1955. They discussed the price received per trick by the prostitutes working at the Town House in Yerington, Nevada, the amount received by them as their share of the drinks sold, and the cost for their room and board while so employed at the Town House. The next morning, Teen packed her belongings and left the apartment. Miss Stuart assisted Teen in placing Teen's effects into the automobile of Miss Stuart. They proceeded to the Office Bar on Vine Street in Hollywood and were joined by appellant. Shortly thereafter, all three walked to the parking lot and participated in placing the suitcases, clothing on hangers including a coat, and the radio of Teen into the automobile of appellant. While in the parking lot, appellant jokingly asked Miss Stuart if she would like to go along with Teen and appellant on a trip. Miss Stuart stated she preferred to remain in Los Angeles. Again appellant jokingly sought to perhaps recruit Miss Stuart as an additional employee at the Town House; he asked if she would like to have a new car. She replied in the negative. Appellant and Teen then departed in the automobile being driven by appellant. Within a day or so, in September of 1955, appellant and Teen were each at the Town House in Yerington, Nevada, and Teen was working there as a prostitute.

Although Teen denied that she travelled to Yerington in the company of appellant, she reluctantly testified that on or about February 10, 1956, he jokingly told her that he was not going to jail and if he did something would happen to her.

It was properly for the jury to determine whether or not Teen had been threatened by appellant and for this reason did not testify truly when she denied that she travelled to Yerington with appellant. The jury could

properly refuse to accept as true the portion of Teen's testimony wherein she denied being transported by appellant. The jury was permitted to deduce from her apparent reluctance to testify and said denial that they were occasioned by the threat by appellant. Further, the jury could properly consider the threat as affirmative evidence of a consciousness of guilt; that appellant, knowing he was guilty and was apt to be convicted, attempted to suborn by fear the anticipated testimony of the principal government witness of the actual transportation. Exclusive of the denial by Teen of transportation by appellant, there was sufficient evidence from which the jury could properly have inferred the transportation and guilt of appellant. Accordingly, the denial of appellant's motion was proper.

B.

**The Motion of Appellant for Judgment of Acquittal
When All of the Evidence Was in Was Properly
Denied.**

A conviction may be sustained where there is substantial evidence, although conflicting, and the conflict is to be resolved in favor of the appellee.

Todorow v. United States (C. A. 9, 1949), 173
F. 2d 439, cert. den. 337 U. S. 925.

"Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . ."

*Woodward Laboratories, Inc., et al. v. United
States* (C. C. A. 9, 1952), 198 F. 2d 995, 998;
Battjes v. United States (C. A. 6, 1949), 172 F. 2d
1.

The true rule . . . is that a trial judge, in passing on a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt, beyond a reasonable doubt.

Curley v. United States (D. C. Cir., 1947), 160 F. 2d 229, 232, cert. den. 331 U. S. 837.

In consideration of the evidence on a motion for a directed verdict, the evidence must be considered in its most favorable aspect to the appellee. If there is substantial evidence it must be submitted to the jury, whose function it is to consider and weigh it, and this includes credibility of witnesses.

Cossack v. United States, 82 F. 2d 214, 215;

Vilson v. United States, 61 F. 2d 901.

It is not for the circuit court to say that the evidence was insufficient merely because the appellate court believes that inferences inconsistent with guilt may be drawn. The appellate court may say that the evidence is insufficient to sustain the verdict only if it can conclude as a matter of law that reasonable minds, as triers of the facts, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence.

Stoppelli v. United States (9th Cir.), 183 F. 2d 391, 393.

As discussed in connection with the denial of appellant's first motion, there was sufficient evidence from which the jury could infer guilt. In addition, upon denial of the motion, appellant testified in his own behalf. It

was established thereby that he was not only a part-time bartender at the Town House but that he was the general manager of this house of prostitution [Tr. p. 137, line 6]. Being general manager, he had more than a casual interest in recruiting personnel for the establishment, at the time when he discussed the details of the working conditions of the prostitutes at the Town House with Teen when he met her in the Keynoter Bar on the evening of September 26, 1955. Appellant testified further that Teen told him "she was trying to find a job somewhere and wanted to get out of town" [Tr. p. 143, lines 18 and 19]. In addition, appellant admitted he made a loan of approximately \$50.00 to Teen on September 27, 1955 [Tr. p. 176, lines 12 to 15 incl.]. If this sum was not an advance on her anticipated earnings working as a prostitute for appellant at the Town House, why did he make the loan? Would not a reasonable mind conclude that appellant did not make the loan in broad daylight to a former prostitute whom he had just met in a bar the evening before but who had departed from the bar without him that evening, and whom he knew was looking for a job out of town. What expectation did appellant have of repayment unless he knew that she was to become an employee in his own place [appellant said it was his place. Tr. p. 125, line 25]? It is not reasonable to assume that a loan in such a sum and under these circumstances, was prompted by munificent motives without thought of repayment. The jury might have accepted the making of the loan as substantial evidence sufficient for them to believe that appellant at least aided Teen to be transported to the Town House by providing funds sufficient for her to obtain other transportation there.

One who aids or abets in the commission of a crime is a principal.

18 U. S. C., Sec. 2(a).

Or the jury, if it did not believe that appellant transported Teen to Nevada, may have believed that he caused her to be transported there by advising her of the working conditions at the Town House and loaning money to her for the transportation.

A person who causes an unlawful act to be done is guilty as a principal.

18 U. S. C., Sec. 2(b);

Nye & Nissen v. United States, 168 F. 2d 846, 855, 336 U. S. 613, 620;

Russell v. United States, 222 F. 2d 197;

United States v. Lieberman, 15 F. R. D. 278.

C.

The Trial Court Committed No Error in Permitting Evidence on Cross-Examination of Appellant, Concerning Transportation by Appellant of Another Person From Los Angeles to Nevada at Times Other Than Alleged in the Indictment.

(a) It is a settled rule that the scope of the cross-examination is not confined to specific questions or details of the direct examination, but extends to the subject matter inquired about.

Salerno v. United States, 61 F. 2d 419;

Cravens v. United States, 62 F. 2d 261;

Little v. United States, 93 F. 2d 954;

United States v. Johnson, 129 F. 2d 954.

See also:

D'Aquino v. United States (9th Cir., 1927), 192 F. 2d 338, cert. den. 343 U. S. 935.

Appellant testified on direct examination that he was bartender and manager of the Town House. He also testified that Peggy was manager. On cross-examination, the government sought to explain the ambiguity of the apparent existence of two managers of the Town House, and to further show the close relationship existing between appellant and Peggy as indicative of the greater measure of discretion which appellant had at the time he met Teen in Los Angeles, *i.e.*, discretion and authority to have offered employment or inducement to Teen to cause her to travel to the Town House to engage in prostitution, if not to affirmatively employ her and transport her to Nevada.

On cross-examination, appellant was questioned and answered as follows: "Q. Of course you were manager? A. In a sense, yes. [Tr. p. 159, lines 12 and 13]." The government sought to ascertain in just what sense appellant was manager of the house of prostitution, by showing his relationship with Peggy. This relationship was subsequently shown, in part, without objection by appellant, when appellant testified on further cross-examination that he and Peggy resided together in separate rooms, with a maid, in a residence adjacent to the Town House [Tr. p. 172, lines 21 to 23 incl.].

Appellant misstates the substance of the evidence elicited by the government at the phase in the cross-examination of which appellant now complains. At page 7, lines 4 to 10 inclusive of Appellant's Opening Brief, it is stated the trial court permitted "the Government to establish by cross-examination over appellant's objection that the latter had at times, other than alleged in the indictment transported a woman, other than the one named in the indictment, in interstate commerce for the purpose of

prostitution. . . .” The record is devoid of any evidence or proffered evidence that the co-manager Peggy was a prostitute. The evidence did not establish that Peggy was a prostitute although concerning the victim, Teen, alias Lee Thornton, it clearly established this element of the offense at the material time.

(b) If the government had sought to establish that appellant had also transported Peggy in interstate commerce at some prior time, for the purpose of prostitution, such evidence may have been properly admitted as evidence of commission by appellant of a similar crime, to show an intent, design or plan or scheme to transport women including Teen in interstate commerce for the purpose of prostitution.

Tedesco v. United States (C. C. A. 9), 118 F. 2d 737, 739-741.

It is competent on cross-examination, to develop all circumstances which qualify his direct testimony even though strictly speaking, such circumstances constitute new matter and are a part of the cross-examiner's own case.

Banning v. United States, 130 F. 2d 330, 339, cert. den. 317 U. S. 695.

(c) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Federal Rules of Criminal Procedure, Rule 52(a).

Error, if any, in cross-examination of accused's witness, did not require reversal where accused did not re-

quest withdrawal of a juror or mistrial or an instruction to disregard, and the court told the jury it would not be guided by anything but the testimony in the case.

United States v. Simon, 119 F. 2d 679, cert. den.
314 U. S. 623.

Similarly, error, if any, in the cross-examination of appellant, was harmless. It did not affect appellant's substantial rights, the trial court discouraged further inquiry on the subject [Tr. p. 160, line 25 *et seq.*], and appellant made no motion for a mistrial.

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

JOSEPH F. BENDER,
Assistant U. S. Attorney,
Attorneys for Appellee,
United States of America.

No. 15334

**United States
Court of Appeals**
for the Ninth Circuit

LUCKY LAGER BREWING COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

**Petition to Review a Decision of the Tax Court
of the United States**

FILE

JAN 18 195

No. 15334

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Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

ARTHUR H. KENT, ESQ.;
VALENTINE BROOKES, ESQ.;
PAUL E. ANDERSON, ESQ.;
RUSSEL SHEARER, ESQ.

For Respondent:

AARON S. RESNICK, ESQ.

The Tax Court of the United States

Docket No. 53063

LUCKY LAGER BREWING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1954

May 24—Petition received and filed. Taxpayer notified. Fee paid.

May 25—Copy of petition served on General Counsel.

May 24—Request for Circuit hearing in San Francisco, Calif., filed by taxpayer. 5/28/54. Granted.

July 8—Answer filed by General Counsel.

July 13—Copy of answer served on taxpayer, San Francisco, Calif.

1955

June 24—Hearing set Oct. 3, 1955, San Francisco, Calif.

Oct. 11—Hearing had before Judge Opper on the merits. Entry of appearance of Valentine Brookes, Esq., and Russel Shearer, Esq., and Stipulation of Facts with Exhibits I, II, III, IV and V attached, filed at hearing. Petitioner's Brief due 11/25/55; Respondent's Brief due 1/9/56; Petitioner's Reply Brief due 2/8/56.

- Oct. 31—Transcript of Hearing 10/4/55 filed.
- Nov. 10—Stipulation to correct transcript, embodying corrections, filed.
- Nov. 17—Motion for extension to Dec. 16, 1955, to file brief filed by taxpayer. 11/18/55. Granted.
- Dec. 15—Brief filed by taxpayer. 12/16/55. Copy served.

1956

- Jan. 30—Answer Brief filed by Respondent. Served 1/31/56.
- Feb. 23—Motion for extension to Mar. 25, 1956, to file reply brief filed by taxpayer. 2/24/56. Granted.
- Mar. 27—Reply Brief filed by Petitioner. 3/27/56. Served.
- July 19—Findings of Fact and Opinion filed, Judge Oppen. Decision will be entered for the Respondent. Served 7/19/56.
- July 23—Decision entered, Judge Oppen, Div. 14, Served 7/25/56.
- Sept. 27—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by Petitioner.
- Sept. 28—Notice of filing petition for review, with proof of service thereon, filed by petitioner.
- Oct. 3—Designation of record on review, with proof of service thereon, filed by petitioner.
- Oct. 3—Acknowledgment of service of designation of the record on review, filed by respondent.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (symbols Ap:SF:AA:FWM 90-D:WHLy) dated April 6, 1954, and as a basis of its proceeding alleges as follows:

1. Petitioner is a corporation organized and existing under the laws of the State of California, with its principal office at 2601 Newhall Street, San Francisco 19, California. Petitioner's business is the brewing and sale of beer for consumption. Its return for the period here involved was filed with the Collector for the Northern District of California at San Francisco. Petitioner keeps its books and makes its income tax returns upon the accrual basis. Petitioner's taxable year is and has been for all years relevant to this proceeding the calendar year.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to petitioner by registered mail on April 6, 1954.

3. The taxes in controversy are income and excess profits taxes for the taxable year ended December 31, 1950, in the amount of \$92,108.20.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining that petitioner satisfies neither of the tests of growth required by Section 435(e)(1)(A)(ii) of the Internal Revenue Code and in consequence is not a growth corporation entitled to the benefits of Section 435(e) of said Code.

(b) Respondent erred in disallowing the excess profits credit of \$3,294,575.86 claimed in petitioner's return and in his further determination that petitioner was not entitled to an excess profits credit for said year in an amount in excess of \$2,703,934.03.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) In the computation of petitioner's gross receipts for the taxable years constituting its base period, to wit: the calendar years 1946, 1947, 1948 and 1949, in connection with the application of the growth test prescribed by Section 435(e)(1)(A)(ii), Internal Revenue Code (see Exhibit B on page 10 of the Statement attached to and forming a part of the notice of deficiency), respondent erroneously omitted and excluded the amounts set forth and described in the following subparagraphs:

(1) Petitioner derived from the sale of spent grains and sacks during its taxable years 1946, 1947, 1948 and 1949 the sums of \$24,030.47, \$28,292.45, \$29,201.88, and \$35,187.79. Such amounts constituted gross income attributable to the trade or business of petitioner.

(2) Petitioner derived from the sale of yeast during its taxable years 1946, 1947, 1948 and 1949, respectively, the sums of \$3,476.61, \$4,755.06, \$7,670.25, and \$11,747.47. Such amounts constituted income attributable to the trade or business of petitioner.

(b) In the computation of petitioner's gross receipts for the aforesaid taxable years constituting its base period, in connection with the application of the growth test prescribed by Section 435(e)(1)(A)(ii), Internal Revenue Code (see Exhibit B on page 10 of the Statement attached to and forming a part of the notice of deficiency), respondent erroneously included the amounts set forth and described in the following subparagraphs:

(1) The amounts shown under the heading of Miscellaneous on line 6 of said Exhibit B, viz., \$1,071.96, \$41.13 (\$126.98), and \$25.45 for petitioner's taxable years 1946, 1947, 1948 and 1949 aforesaid, represent sums derived from the sale of scrap, checks written off, and unclaimed container deposits. Amounts derived from the sale of scrap are expressly excluded under Section 435(e)(5)(B)(i), Internal Revenue Code, as proceeds from the sale of property, while amounts derived from checks written off and unclaimed container deposits are expressly excluded under Section 435(e)(5)(B)(ii) as income derived from the discharge of indebtedness.

(2) Petitioner derived interest on United States bonds in the amounts of \$18,886.51 for its taxable

year 1946 and \$19,102.75 for its taxable year 1947, while for its taxable year 1948 petitioner sustained a loss in the amount of \$4,518.26 by cashing in before their maturity discount United States bonds on which interest had been accrued theretofore. (See Exhibit B aforesaid, line 3). Such bond interest and loss were not income or loss attributable to petitioner's trade or business.

(3) The item labeled "Judgment" on line 7 of Exhibit B aforesaid, to wit: \$3,139.88 for petitioner's taxable year 1947, represents the settlement in that year of a suit instituted by petitioner many years before against a supplier of barrels on account of bad barrels shipped to petitioner in the year 1933.

(4) The amounts shown on line 5 of Exhibit B aforesaid under the caption "Discount received," to wit: \$11,642.97, \$26,314.59, \$27,108.96, and \$43,530.23 for petitioner's taxable years 1946, 1947, 1948 and 1949, respectively, represent trade discounts received by petitioner during said years on various materials and supplies purchased by it. They constituted as such reductions in the cost of such materials and supplies and not gross receipts of petitioner's trade or business.

(5) The figure of \$13,692.82 for petitioner's taxable year 1947 and the figure of \$1,713.33 for petitioner's taxable year 1948, shown on lines 8 and 9 of Exhibit B aforesaid, represent, as their caption indicates, quantity discounts on cans purchased received by petitioner during said years. They constituted as such reductions in the cost of cans

purchased and not gross receipts of petitioner's trade or business.

(6) The figures shown in line 1 of Exhibit B aforesaid under the caption "Gross Sales," to wit: \$12,878,751.99, \$16,311,138.47, \$18,161,135.39, and \$23,003,696.22 for petitioner's taxable years 1946, 1947, 1948 and 1949, respectively, include the amounts for such years of the federal stamp tax imposed by Section 3150 of the Internal Revenue Code "* * * on all beer * * * brewed or manufactured and sold, or removed for consumption or sale, within the United States, or imported into the United States, * * *," and the excise tax "* * * upon all beer * * * sold in this state by a manufacturer * * *," imposed by Section 23 of the Alcoholic Beverage Control Act, being Act 3796 of the General Laws of the State of California, and paid by petitioner. The amounts included in gross sales which represent the total of these two taxes are \$4,849,076.70 for petitioner's taxable year 1946, \$5,687,831.75 for the taxable year 1947, \$5,908,185.09 for the taxable year 1948, and \$7,192,289.27 for the taxable year 1949. The aforesaid taxes constitute excise taxes levied upon petitioner for the sale or removal of beer for consumption and their amount is not properly includible in the computation of petitioner's gross receipts for the purposes of Section 435(e)(1)(A)(ii) of the Internal Revenue Code.

Wherefore, petitioner prays that this Honorable Court may hear the proceeding and that the Court

shall determine that there is no deficiency in the income tax and excess profits tax liability of petitioner for its taxable year ended December 31, 1950, in excess of \$10,235.74.

/s/ ARTHUR H. KENT,

/s/ VALENTINE BROOKES,

/s/ PAUL E. ANDERSON,

/s/ RUSSEL SHEARER,

Counsel for Petitioner.

State of California,

City and County of San Francisco—ss.

Eugene S. Selvage, being duly sworn, says that he is the President of Lucky Lager Brewing Company, the corporation named as petitioner in the above proceeding, and as such is duly authorized to verify the foregoing petition; that he has read said petition and is familiar with the statements contained therein, and that the facts stated therein are true to the best of his knowledge, information and belief.

[Seal] /s/ EUGENE S. SELVAGE.

Subscribed and sworn to before me this 18th day of May, 1954.

[Seal] /s/ MARGARET ENNIS,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 6, 1955.

U. S. Treasury Department
Office of the Regional Commissioner
Internal Revenue Service
Appellate Division—San Francisco Region
Room 710 - 630 Sansome Street
San Francisco 11, California

In Replying Refer to:

Ap:SF:AA:EWM

90-D:WHLy

April 6, 1954.

Lucky Lager Brewing Company
2601 Newhall Street
San Francisco 19, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1950, discloses a deficiency of \$102,-343.94 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th

day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Room 710, 630 Sansome Street, San Francisco 11, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner;

By /s/ WM. H. LAWDER,
Associate Chief, Appellate
Division.

Enclosures:

Statement

Form 1276

Agreement

Exhibits A, B, & C

Ap:SF:AA:EWM

90-D:WHL:v

Statement

Lucky Lager Brewing Company

2601 Newhall Street

San Francisco 19, California

Tax liability for the taxable year ended December 31, 1950

	Deficiency
Income Tax	\$102,343.94

In making this determination of your income tax liability, careful consideration has been given to your protest dated August 20, 1953, and to the statements made at the conference held on November 25, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. Russel Shearer, c/o Shearer & Thomas, 1 Montgomery Street, San Francisco 4, California, in accordance with the authority contained in the power of attorney executed by you.

Year 1950

Adjustments to Net Income

Net income as disclosed by the original return		\$4,198,745.53
Unallowable deductions and additional income:		
(a) Adjustment of allowable deduction for Brewers' Association Dues		16,541.70
(b) Adjustment of deduction for cash discounts		11,455.70
		<hr/>
Total		\$4,226,742.93
Nontaxable income and additional deductions:		
(c) Adjustment of deduction for vacation pay	\$1,034.42	
(d) Adjustment of deduction for depreciation	1,768.76	
(e) Adjustment of deduction for franchise tax	823.42	3,626.60
		<hr/>
Net income as adjusted.....		\$4,223,116.33

Explanation of Adjustments

(a) Net income is increased \$16,541.70, representing an adjustment of the allowable deduction for Brewers' Association Dues. Computation of adjustment is shown below:

Amount paid to California State Brewers'

Institute as contributions to the Public
Relations Fund at the rate of 5c per

barrel\$ 51,632.74

Percentage of above payment held to be

unallowable 82.0372295%

Amount of payment unallowable as revised

(82.0372295% of \$51,632.74)\$ 42,358.07

Amount of payment unallowable as shown

by the original return 25,816.37

Increase in net income (additional amount

unallowable)\$ 16,541.70

(b) Net income is increased \$11,455.70, representing an adjustment of deduction for Cash Discounts.

Deduction for Cash Discounts taken on the

original return\$ 11,455.70

Allowable deduction for Cash Discounts..... None

Increase in net income.....\$ 11,455.70

(c) Net income is decreased \$1,034.42, representing an adjustment of the accrual in the year 1950 for vacation payments to be made in the year 1951.

Deduction claimed in the original return for

accrual of vacation payments\$117,052.55

Vacation payments made in the year 1951.... 118,086.97

Decrease in net income.....\$ 1,034.42

(d) Net income is decreased \$1,768.76, representing the allowance of an additional deduction for depreciation. See Exhibit A.

(e) Net income is decreased \$823.42, representing an adjustment of deduction for franchise tax.

Computation of adjustment is shown below:

Additional income for the year 1949 as per Revenue Agent's report for that year.....	\$ 20,782.58
Less: Franchise tax adjustment for the year 1949 by Revenue Agent's report.....	197.01
<hr/>	
Additional 1949 income for franchise tax purposes	\$ 20,585.57
<hr/>	
Additional allowable deduction for franchise tax (4% of \$20,585.57)	\$ 823.42

Computation of Income Tax

Net income	\$4,223,116.33
Less: Dividends received credit.....	None
<hr/>	
Normal-tax net income	\$4,223,116.33
<hr/>	
Normal tax on \$4,223,116.33 at 23%.....	\$ 971,316.76
<hr/>	
Net income	\$4,223,116.33
Less: Dividends received credit.....	None
<hr/>	
Surtax net income	\$4,223,116.33
<hr/>	
Surtax on \$25,000.00	None
<hr/>	
Surtax on \$4,198,116.33 at 19%.....	\$ 797,642.10
<hr/>	
Total normal tax and surtax.....	\$1,768,958.86
Add: Excess profits tax.....	230,686.42
<hr/>	
Income tax liability	\$1,999,645.28
<hr/>	
Income tax assessed:	
Original Account No. 419107, September, 1951	
List. First California District	1,897,301.34
<hr/>	
Deficiency in income tax	\$ 102,343.94

Adjustments to Excess Profits Net Income

Excess profits net income as disclosed by the original return	\$4,210,899.27
Unallowable deductions and additional income:	
(a) Net increase in income tax net income.....	24,370.80
	<hr/>
Total	\$4,235,270.07
Nontaxable income and additional deductions:	
(b) Elimination of net loss from sale of property	5,963.86
	<hr/>
Excess profits net income as adjusted.....	\$4,229,306.21

Explanation of Adjustments

(a) Excess profits net income is increased \$24,370.80, representing net increase in income tax net income.

(b) Excess profits net income is decreased \$5,963.86, representing the elimination of a loss on sale of property other than capital assets which was erroneously added to excess profits net income in the original return.

Computation of Excess Profits Tax

Excess profits net income	\$4,229,306.21
Less: Excess profits credit	2,703,934.03
	<hr/>
Adjusted excess-profits net income..	\$1,525,372.18
	<hr/>
30% of adjusted excess-profits net income	\$ 457,611.65
	<hr/>
62% of excess profits net income....	\$2,622,169.85
Less: Normal tax and surtax on excess-profits net income:	
42% of \$4,229,306.21.....	\$1,776,308.61
Less:	4,750.00
	<hr/>
Balance	\$ 850,611.24
	<hr/>
Above balance, or 30% of adjusted excess-profits net income, whichever is the lesser amount.....	\$ 457,611.65
	<hr/>
Excess profits tax (184/365ths of \$457,611.65)	\$ 230,686.42

Base Period Net Income	As Disclosed by Return	Additions (Deductions)	Corrected
Excess profits net income:			
Year ended Dec. 31, 1946.....	\$2,049,770.13 (a)	(\$36,235.32)	\$2,013,534.81
Year ended Dec. 31, 1947.....	2,081,585.90 (b)	(3,625.38)	2,077,960.52
Year ended Dec. 31, 1948.....	2,341,402.92 (c)	3,643.40	2,345,046.32
Year ended Dec. 31, 1949.....	2,846,016.32 (d)	16,068.49	3,862,084.81
Aggregate of 3 highest years.....	\$8,269,005.14	\$16,086.51	\$8,285,091.65
Average base period net income.....	\$2,756,335.04	\$ 5,362.18	\$2,761,697.22
Base period net income—			
Alternative based on growth.....	\$3,846,016.32		Not applicable see adjustment (e)
Average base period net income.....	\$3,846,016.32		\$2,761,697.22
Excess Profits Credit			
85% of average base period net income of			
\$2,761,697.22			\$2,347,442.64
Add: 12% of base period capital addition, See Exhibit C			331,029.40
12% of net capital addition as shown by the return			25,461.99
Excess profits credit			\$2,703,934.03

Explanation of Adjustments to
Excess Profits Credit

(a) Abnormal deduction of \$36,235.32 is restored, since the deduction does not exceed 5% of the 4 year average base period excess profits net income. Section 433(b)(10)(B) Internal Revenue Code.

(b) Abnormal deduction of \$3,625.38 is restored, since the deduction does not exceed 5% of the 4 year average base period excess profits net income. Section 433(b)(10)(B) Internal Revenue Code.

(c) Excess profits net income for the year 1948 is increased \$3,643.40. Computation of adjustment is shown below:

Normal tax net income for the year 1948 as shown by the Revenue Agent's report.....	\$2,349,415.33
Normal tax net income for the base period year 1948 as shown by the 1950 return.....	2,345,771.93
	<hr/>
Increase in excess profits net income.....	\$ 3,643.40

(d) Excess profits net income for the year 1949 is increased \$16,068.49. Computation of adjustment is shown below:

Normal tax net income for the year 1949 as shown by the Revenue Agent's report.....	\$3,859,549.58
Normal tax net income for the base period year 1949 as shown by the 1950 return.....	3,838,767.00
	<hr/>
Increase in excess profits net income.....	\$ 20,782.58

Less:

Restoration of abnormal deduction of \$4,714.09 claimed in the original return, since the deduc- tion does not exceed 5% of the 4 year average base period excess profits net income in accord- ance with Section 433 (b) (10) (B) Internal Revenue Code	 4,714.09
	<hr/>

Net increase in excess profits net income.....	\$ 16,068.49
--	--------------

(e) The excess profits credit of \$3,294,575.86 claimed in your return as a growth corporation entitled to the benefits of Section 435(e) of the Internal Revenue Code has been adjusted to eliminate the benefits of that section. It is held that neither of the tests of growth required by Section 435(e)(1)(A)(ii) has been met. See Exhibit B.

EXHIBIT A

Adjustment in Allowable Depreciation

Item	Date Acquired	Cost	Rate of Depreciation	Allowable Depreciation	Corrected Reserve 12-31-49	Corrected Reserve 12-31-50
Canopies on Warehouse #3.....	4/11/46	\$ 1,685.00	21½%	\$ 42.13	\$ 157.98	\$ 200.11
Roof sign	10/31/47	3,605.00	6⅔%	240.45	520.97	761.42
Paving main truck driveway.....	11/29/47	8,851.15	10 %	885.12	1,844.00	2,729.12
Wiring #6 bottle line.....	5/31/48	2,955.05	12½%	369.38	584.85	954.23
4 sets attachments to rotary labelers	10/12/48	1,853.46	12½%	231.68	289.60	521.28
Totals		\$18,949.66		\$1,768.76	\$3,397.40	\$5,166.16
Depreciation claimed on the origi- nal return				None		
Additional depreciation allowable				\$1,768.76		

EXHIBIT B

Growth Test Under Section 435(e) (1) (A) (ii)

Internal Revenue Code

(Gross Receipts During the Base Period)

	1946	1947	1948	1949
Gross Sales	\$12,878,751.99	\$16,311,138.47	\$18,161,135.39	\$23,003,696.22
Interest	766.88	749.99	4,284.73	1,360.56
Interest on U. S. Bonds	18,886.51	19,102.75	(4,518.26)	—
Royalties	45,000.00	45,000.00	45,000.00	45,000.00
Other Income:				
Discount received	11,642.97	26,314.59	27,108.96	43,530.23
Miscellaneous	1,071.96	41.13	(126.98)	25.45
Judgment	—	3,139.88	—	—
Quantity discount rebate on cans purchased:				
Year 1947		13,692.82		
Year 1948			1,713.33	
Gross receipts, Section 435(e) (5)	\$12,956,120.31	\$16,419,179.63	\$18,234,597.17	\$23,093,612.46
Total, last half of base period			\$41,328,209.63	
Total, first half of base period			\$29,375,299.94	
Ratio of last half to first half			140.69%	

EXHIBIT C
Base Period Capital Addition

	(Col. 1) Year 1950	(Col. 2) Year 1949	(Col. 3) Year 1948
Equity capital beginning of year	\$7,656,119.07	\$5,664,828.80	\$4,621,658.89
75% of borrowed capital beginning of year.....	318,750.00	—	—
Total	\$7,974,869.07	\$5,664,828.80	\$4,621,658.89
Adjustment for interest on borrowed capital	\$ 97,395.83	—	—
Total	\$7,974,869.07	\$5,664,828.80	\$4,621,658.89
75% thereof	\$ 73,046.87	—	—
Yearly base period capital	\$7,901,822.20	\$5,664,828.80	\$4,621,658.89
Excess of Column 1 over the higher of Column 2 or Column 3			\$2,236,993.40
50% of excess of Column 2 over Column 3.....			521,584.96
Base period capital addition			\$2,758,578.36
12% of base period capital addition			\$ 331,029.40
Total assets as shown by the return	\$10,463,951.42	\$7,209,490.83	\$6,155,228.98
Total liabilities as shown by the return	2,838,580.98	1,575,194.55	1,573,608.22
Equity capital as shown by the return	\$7,625,370.44	\$5,634,296.28	\$4,581,620.76
Additional income as shown by Revenue Agent's re- ports: 1946-1947-1948	42,378.18	42,378.18	56,464.31
1949	12,533.59	—	—
1945 tax refund		4,420.10	4,420.10
Total	\$7,680,282.21	\$5,681,094.56	\$4,642,505.17

	(Col. 1) Year 1950	(Col. 2) Year 1949	(Col. 3) Year 1948
Deduct additional income tax: 1946-1947-1948	14,881.27	14,881.27	20,846.9
1948-1949	9,281.87	1,384.49	—
Equity capital as corrected	\$7,656,119.07	\$5,664,828.80	\$4,621,658.9
(b) Notes payable January 1, 1950, as shown by Schedule L of the original return....			\$ 425,000.0
75% thereof			\$ 318,750.0
(c) Notes outstanding December 31, 1949, per book account 87			\$ 425,000.0
Interest rate (American Trust Co.)			23/4
Annual interest			\$ 11,687.5
Annual interest multiplied by 100			\$1,168,750.0
Adjustment for interest on borrowed capital (\$1,168,750.00 divided by 12)			\$ 97,395.8
(d) 75% of adjustment for interest on borrowed capital in accordance with the provisions of Section 435(f) (1) (C) of the Internal Revenue Code (75% of \$97,395.83)			\$ 73,046.9

Form 870 (1951)
U. S. Treasury Department
Internal Revenue Service

Lucky Lager Brewing Company
2601 Newhall Street
San Francisco 19, California

Ap:SF:AA:EWM
90—D:WHLy

Waiver of Restrictions on Assessment and
Collection of Deficiency in Tax
and
Acceptance of Overassessment

Pursuant to section 272 (d) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws, the restrictions provided in section 272 (a) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies together with interest on the tax as provided by law; and the following over-assessments are accepted as correct:

Deficiencies

Type of Tax	Year Ended	Tax	Total
Income Tax.....	December 31, 1950	\$102,343.94	\$102,343.94

Form 870 (1951)

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Deficiencies

Type of Tax	Year Ended	Tax	Total
Income Tax.....	December 31, 1950	\$102,343.94	\$102,343.94

[Endorsed]: Filed May 24, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the

above-named petitioner, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1 to 3, inclusive, of the petition.

4(a) and (b). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a)(1) and (2), and (b)(1) to (6), inclusive. Denies the allegations contained in subparagraphs (a)(1) and (2) and (b)(1) to (6), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ DANIEL A. TAYLOR, W.P.
Chief Counsel, Internal
Revenue Service.

[Endorsed]: Filed July 8, 1954.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

The following facts are stipulated to be true and may be accepted by the Court to the same extent as if established by competent evidence:

1. Petitioner is and has been for all years relevant to this proceeding a corporation organized and existing under the laws of the State of California, with its principal office at 2601 Newhall Street, San Francisco 19, California, petitioner's business being the brewing and sale of beer for consumption. Petitioner's returns for all years involved in the proceeding were filed with the Collector of Internal Revenue for the Northern District of California at San Francisco. Petitioner keeps its books and makes its income tax returns upon the accrual basis. Petitioner's taxable year is and has been for all years relevant to this proceeding the calendar year. For taxable years prior to the calendar year 1949, petitioner's corporate name was "General Brewing Corporation." On January 1, 1949, its corporate name was changed to "Lucky Lager Brewing Company."

2. Appended to this stipulation as Exhibit I are photostatic copies of United States Corporation Income Tax Returns (Form 1120) filed by petitioner for its taxable years 1946, 1947, 1948, 1949 and 1950. Such photostatic copies do not include certain schedules filed with the returns whose contents are irrelevant to any issue involved in the present proceeding.

3. Appended to this stipulation as Exhibit II is a schedule which accurately reflects figures appearing on petitioner's books of account and federal income tax returns for its taxable years 1946 to 1949, inclusive. The parties are agreed upon the

accuracy of these figures as figures, but the form in which the schedule is cast and the captions and terms used therein are intended by the parties to be and shall be without prejudice to the position of either party as to what constitutes "gross receipts" for the purposes of the growth test prescribed by Section 435(e)(1)(A)(ii), 1939 Internal Revenue Code. The figures at the top of the schedule at the head of the four columns opposite the term "Gross Sales" are the figures appearing in line 1 of petitioner's United States Corporation Income Tax Returns (Exhibit I hereto) for the four taxable years aforesaid, respectively. The amount of beer excise taxes paid in each of said years is included in the amount shown on line 2 of said returns opposite the term "Less: Cost of goods sold (from Schedule A)."

If the items shown as additions on the eight lines of the schedule below Gross Sales at the top of the schedule are held to constitute "gross income, attributable to a trade or business regularly carried on by the taxpayer * * *" under Section 435(e)(5), 1939 Internal Revenue Code, then the figures representing "Ratio of last half to first half" contained in the schedule are correctly computed. The parties are agreed and so stipulate that the figures in the first line representing "Interest" and the figures in the sixth, seventh and eighth lines representing "Royalties," "Sales of Spent Grain & Sacks," and "Sales of Yeast" are proper additions in computing gross receipts under Section 435(e)(1)(A)(ii), but

petitioner reserves the right to question the includibility of the item "Interest on U. S. Bonds" on line 2, the item "Miscellaneous" on line 3, the item "Discount received" on line 4, and the item "Judgment" on line 5. It is stipulated that the effect of the elimination of these last four items from the computation will be to increase slightly the two ratios shown in the schedule as 140.67 and 150.30.

4. Appended to this stipulation as Exhibit III are true copies of five sales invoices sent by petitioner to customers. Said invoices are typical of the form of invoice used by petitioner during its base period years 1946 to 1949, inclusive.

5. Appended to this stipulation as Exhibit IV is a set of Lucky Lager Price Schedules promulgated at various times during petitioner's base period years 1946 to 1949, inclusive. The schedules included in this Exhibit are fairly typical of price schedules used during such years. Copies of all California schedules were regularly filed with the California Board of Equalization pursuant to law.

6. During petitioner's base period years 1946 to 1949, inclusive, petitioner's published annual reports reported under the caption "Gross Sales" the same amounts as on line 1 of its United States Corporation Income Tax Returns. The amounts paid by petitioner as federal and state excise taxes upon beer sold were not separately shown.

7. At all times herein material, the California Tax was paid by return on a month's sales on the 15th of the following month.

Up to March 1, 1950, and during all of the base period of taxpayer, under federal beer regulations the tax was paid by stamps purchased. The amount of stamps on hand was carried by taxpayer in an account entitled "Revenue Stamps on Hand," together with any state stamps held.

Under the federal beer regulations the tax was required to be paid prior to the time the beer was sold or delivered for consumption, and at the time the tanks were released by the Alcohol Tax Unit gauger to enable taxpayer to bottle its beer or fill cans with its beer.

The stamps surrendered from time to time when taxpayer bottled or canned its beer were transferred from the account "Revenue Stamps on Hand" to an account entitled "Tax on Bottled Beer," or "Tax on Canned Beer," as the case might be.

Unexpended beer stamps were not carried in the annual report under or as a part of the classification "Inventory," but were carried as a separate item under the heading "Current Assets."

If during the process of bottling, or later, beer was spoiled, was lost, or was sold to another brewer in bond, the amount of the stamps was refundable to taxpayer, and taxpayer credited the amount of such refunds to the proper accounts, to wit: "Tax on Bottled Beer" or "Tax on Canned Beer," as the case might be. In the case of one refund, where the refund was not obtained until substantially

later, such refund was included in taxpayer's books as "Miscellaneous Income" in 1949.

Effective March 1, 1950, the Treasury regulations relating to the collection of beer taxes were modified in the manner set forth in T.D. 5769, Federal Register, Jan. 31, 1950, 1950-1 CB, pp. 244, et seq.

The language of Section 3150 of the 1939 Internal Revenue Code, which imposed and described the federal excise tax on beer, was not in any way changed during any year herein material following 1945.

The attached Exhibit V consists of a photostatic copy of sheets from taxpayer's ledger accounts for the year 1948 and such accounts are some of the accounts to which reference has been made herein. These ledger accounts for the years 1946, 1947 and 1949 were maintained in the same manner.

8. If the Court shall find and adjudge that petitioner is entitled to the application of Section 435(e), 1939 Internal Revenue Code, in the determination of its excess profits tax credit based upon average base period net income, then the excess profits net income of petitioner for its taxable year 1949 as shown in the statutory notice of deficiency shall be reduced by the amount of \$70,772.21 and the excess profits net income of petitioner for its taxable year 1948 as shown in said statutory notice shall be increased by an identical amount.

9. Counsel for the respective parties reserve the right to object to the materiality or relevancy of

any matter contained in this stipulation, and also reserve the right to offer in evidence additional facts not in conflict with the facts herein stipulated as true.

/s/ ARTHUR H. KENT,

/s/ VALENTINE BROOKES,

/s/ PAUL E. ANDERSON,

/s/ RUSSEL SHEARER,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

EXHIBIT No. 1

United States
Corporation Income Tax Return
For Calendar Year 1949

Corporation's Name and Address:

Lucky Lager Brewing Company
2601 Newhall Street
San Francisco 19, California

Date incorporated: 9/6/33.

State or County: California.

Principal business activity: Manufacturing.

Business group code number: 192.

Number of places of business: 3.

Net Income Computation

Gross Income

Item and Instruction No.

1. Gross sales (where inventories are an income-determining factor); Less: Returns and allowances\$23,003,696.22

2. Less: Cost of goods sold. (From Schedule A)	17,132,484.68	
		<hr/>
3. Gross profit from sales.....	\$ 5,871,211.54	
4. Gross receipts (where inven- tories are not an income- determining factor)		
5. Less: Cost of operations. (From Schedule B)		
6. Gross profit where inventories are not an income-determining factor		
7. Interest on loans, notes, mort- gages, bonds, bank deposits, etc.	1,360.56	
		* * *
11. Royalties	45,000.00	
12. * * *		
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D).....	(2,535.23)	
13. Dividends. (From Schedule E)		
14. Other income. (State nature)	119,669.07	
		<hr/>
15. Total income in items 3, and 6 to 14, inclusive.....		\$6,034,705.94

* * *

United States
Corporation Income Tax Return
For Calendar Year 1950

Corporation's Name and Address:

Lucky Lager Brewing Company
2601 Newhall Street
San Francisco 19, California

Date incorporated: 9/6/33.

State or county: California.

Principal business activity: Malt Liquors.

Business group code number: 192.

Number of places of business: 4.

Net Income Computation

Gross Income

Item and Instruction No.

1. Gross sales (where inventories are an income-determining factor); Less: Returns and allowances\$30,467,131.41
2. Less: Cost of goods sold.
(From Schedule A) 22,736,644.70
3. Gross profit from sales.....\$ 7,730,486.71
4. Gross receipts (where inventories are not an income-determining factor)
5. Less: Cost of operations.
(From Schedule B)
6. Gross profit where inventories are not an income-determining factor
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. 176.16

10. Rents	225.00
11. Royalties	33,750.00
12. * * *	
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)	(5,963.86)
13. Dividends. (From Schedule E)	
14. Other income. (State nature)	67,484.74
15. Total income in items 3, and 6 to 14, inclusive.....	\$7,826,158.75

* * *

[Endorsed]: Filed Oct. 11, 1955.

[Title of Tax Court and Cause.]

FINDINGS OF FACTS AND OPINION

“Gross receipts,” for purposes of the excess profits tax “growth formula” (section 435 (e) (1), Internal Revenue Code of 1939) held to include all amounts received or accrued from sales, not excluding those added to the sales price as reimbursement for beer excise taxes.

VALENTINE BROOKES, ESQ., and
RUSSEL SHEARER, ESQ.,

For the Petitioner.

AARON S. RESNIK, ESQ.,
For the Respondent.

Respondent determined a deficiency of \$102,-343.94 in income and excess profits tax for the calendar year 1950, of which \$92,108.20 is in dispute. The single general issue involved is whether petitioner was entitled to compute its excess profits tax credit using average base period income under the alternative method based on growth, reflected by an increase in gross receipts. Resolution of that issue depends on whether the term "gross receipts" includes Federal and state beer excise taxes.

Findings of Fact

Certain facts have been stipulated and are found accordingly.

Petitioner, a California corporation, brews and sells beer. It filed its returns for all years involved with the collector of internal revenue for the northern district of California. It keeps its books on an accrual basis and uses the calendar year. On January 1, 1949, petitioner changed its name from General Brewing Corporation.

Petitioner's base period was the calendar years 1946, 1947, 1948 and 1949. Adjusted basis for determining gain on sale or exchange of all assets held by it for business purposes as of January 1, 1946, amounted to less than \$20,000,000. It had no privilege of filing a consolidated return with any other corporations for 1950.

Petitioner reported on its income tax returns gross sales of \$12,878,751.99 for 1946, \$16,311,138.47

for 1947, \$18,161,135.39 for 1948, and \$23,003,696.22 for 1949. These amounts represent the total amounts received or accrued from the sale of beer. Federal and state excise taxes paid or accrued for 1946 through 1949 upon beer manufactured and sold totaled \$4,849,076.70, \$5,687,831.75, \$5,837,412.88, and \$7,192,289.27, respectively. These amounts were not excluded from gross sales but were included in cost of goods sold as reported on line 2 of the Federal income tax return.

The 2-year total of the gross sales shown on the 1948 and 1949 returns is \$41,164,831.61, and for 1946 and 1947 is \$29,189,890.46. The total for the later 2 years is 141 per cent of the total for the prior 2 years. The total of the gross sales, excluding Federal and state beer excise taxes, for 1948 and 1949 is \$28,135,129.46, and for 1946 and 1947 is \$18,652,982.01. This total for the later 2 years is 150.8 per cent of the total for the earlier years.

The following items also constituted gross receipts:

	1946	1947	1948	1949
Interest	\$ 768.88	\$ 749.99	\$ 4,284.73	\$ 1,360.56
Royalties	45,000.00	45,000.00	45,000.00	45,000.00
Sales of spent grain & sacks..	24,030.47	28,292.45	29,201.88	35,187.79
Sales of yeast....	3,476.61	4,755.06	7,670.25	11,747.47
Total	\$73,275.96	\$78,797.50	\$86,156.86	\$93,295.82

These items for 1948 and 1949 total \$179,452.68, and for 1946 and 1947, \$152,073.46. Those figures added to gross sales change the ratio including ex-

cise taxes from 141 to 140.9, and the ratio excluding taxes from 150.8 to 150.57.

Other income during the base period included:

	1946	1947	1948	1949
Cash discounts				
on purchases ..	\$11,642.97	\$26,314.59	\$27,108.96	\$43,530.23
Interest on. U. S.				
bonds	18,886.51	19,102.75	—	—
Judgment	—	3,139.88	—	—
Miscellaneous	1,071.96	41.13	—	25.45
Total	\$31,601.44	\$48,598.35	\$27,108.96	\$43,555.68

Inclusion of these amounts in the computations does not significantly affect the ratios of gross receipts.

On invoices covering shipments to customers within the United States, petitioner did not state beer excise taxes separate from unit prices. Invoices covering shipments to United States territories (e.g., Hawaii) stated that Federal tax was paid and the shipment was exempt from state tax. Invoices covering shipments to United States possessions (e.g., Samoa) stated that the shipment was tax-free.

During the years 1946 through 1949, petitioner published for various trading areas price schedules showing sale prices and terms. It regularly filed copies of schedules covering California areas with the California Board of Equalization pursuant to law. The California schedules did not state excise taxes separately. Price schedules for Nevada bore the notation that Nevada state tax was not included. Nevada schedules dated on and after February 1,

1948, specifically deducted California tax. The prices in Nevada from December 1, 1946, to February 1, 1948, were identical to those in Los Angeles from November 15, 1946, to June 20, 1947. Schedules for exports to United States possessions and foreign countries deducted both state and Federal taxes in the explanation of the price. Petitioner did not alter its methods of invoicing or pricing after March 1, 1950. It followed the general procedure in the brewing industry, not to show excise taxes separately on invoices or price lists.

Petitioner's published annual reports for 1946 through 1949 reported the same gross sales as shown on the returns. They did not show excise taxes separately.

Prior to March 1, 1950, breweries paid Federal excise tax by stamps. Petitioner carried the amount of unused stamps on hand, along with any state stamps, in an account entitled "Revenue Stamps on Hand." It carried this account as a separate item under "Current Assets" in the annual report, rather than as an inventory item. When beer was canned or bottled, it transferred the amount of stamps surrendered from "Revenue Stamps on Hand" to "Tax on Canned Beer" or "Tax on Bottled Beer." It paid state tax by monthly return on the previous month's sales.

Petitioner credited refunds to the "Tax on Bottled Beer" or "Tax on Canned Beer" accounts, except one substantially delayed refund in 1949, which it credited to "Miscellaneous Income."

After March 1, 1950, Federal tax was collected by stamp after the bottled or canned beer was withdrawn for sale or consumption. The beer tax statute remained unchanged during any material year.

Petitioner's accounts reflect manufacturing processes from the purchase of raw materials through the brewing, placement of beer in fermenting tanks, movement to aging tanks in cellars, and transfer to the bottling and canning lines. After packaging, beer is sent to the shipping warehouse and from there to distributors. "Inventory Beer in Process," to which a large bulk inventory is transferred when the beer reaches the cellars, reflects costs incurred up to that point including real and personal property taxes and social security taxes. After aging, the beer is withdrawn for bottling and canning, at which time costs of inventory in process are apportioned to a bottled beer cost account and a canned beer cost account, to which accounts bottling and canning costs are also charged. Warehousing and shipping costs are allocated to the bottled beer and canned beer cost accounts, which then show the total cost of beer produced exclusive of excise taxes.

Petitioner carried beer on hand in inventory. It recorded taxes paid on unshipped beer in accounts entitled "Inventory—Bottle Tanks—Federal Tax" and "Inventory—Canned Beer—Federal Tax." On the balance sheet it combined these accounts into "the inventory of federal tax," which in turn it combined with the bottled and canned beer cost accounts to arrive at a total inventory figure.

Since March 1, 1950, petitioner has used the same accounting method, except that it shows no Federal tax related to inventories, since it pays no tax until beer is sold. Its method of invoicing and pricing of merchandise remained unchanged. The tax now appears as an expense in the month when the liability accrues, as state excise taxes had always been handled.

Petitioner increased its over-all average prices, exclusive of excise taxes, for 1948 and 1949 over 1946 and 1947 by 21.6 per cent. Excise tax rates did not change during the base period.

No single classification of excise taxes is customary in accounting practice. Some are included in gross sales in corporate returns, while others are customarily excluded. Reports to stockholders generally conform to the company books, but may differ from the tax returns due to statutory requirements of tax reporting.

Where excise taxes are included in gross sales, tax returns and corporate reports subtract them as part of cost of goods sold, or as an expense deduction, or as a deduction from gross sales in arriving at net sales. Net sales for one period are frequently compared with those of another to determine a company's growth.

Petroleum companies exclude Federal and state gasoline taxes from gross sales. Retail establishments exclude state and city retail sales taxes, as

well as luxury taxes, such as on furs. The Federal tax on phonographs and television sets is customarily excluded. Those taxes are not regarded as an item of income or expense.

None of nine breweries chosen at random from Securities and Exchange Commission records excluded the excise taxes from gross sales, all reporting the total proceeds from beer sales. These breweries treated excise taxes in three different ways: Seven deducted the taxes from gross sales to arrive at net sales; another deducted both cost of goods sold and excise taxes from sales to determine gross profit; the ninth included excise taxes in cost of goods sold, dropping a footnote thereto stating that excise taxes of a certain amount were included.

A manufacturer makes no distinction as to excises on sales to a distributor or directly to the consumer.

Amounts of retail sales taxes collected, sometimes unknown, do not necessarily correspond to the amounts excluded from gross sales. California practice calls for application to the gross collections of a percentage based on an analysis of purchases as agreed to by the State Board of Equalization. Even though the retailer records the actual tax collected, he must apply the tax rate to his sales regardless of collections. Fractional differences in certain transactions necessarily result in an overage or shortage. Failure of collections to correspond to exclusions from gross sales does not improperly reflect income.

“Gross receipts” is not clearly or precisely defined by accountants, who usually keep accounts on the basis of “gross sales” and “net sales.”

Petitioner’s excess profits net income was overstated in the notice of deficiency by \$70,772.21 for 1949, but understated by that amount for 1948.

Petitioner’s gross receipts for the last half of the base period are less than 150 per cent of its gross receipts for the first half of its base period.

Opinion

Opper, Judge:

Although a large part of the argument of the parties is occupied with an examination of the characteristics of the Federal and state tax on beer, we think the true issue requires a consideration primarily of the scope and purpose of the growth formula in the 1950 Excess Profits Tax Act.¹

¹Sec. 435. Excess Profits Credit—Based on Income.

(e) Average Base Period Net Income—Alternative Based on Growth—

(1) Taxpayers to Which Subsection Applies—A taxpayer shall be entitled to the benefits of this subsection if the taxpayer commenced business before the end of its base period, and if either—

(A) (i) The total assets of the taxpayer as of the first day of its base period (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter), determined under paragraph (3), did not exceed \$20,000,000, and

In place of the net taxable income test of the wartime excess profits tax law,² the statutory approach adopted in 1950 was to determine growth by presumably objective tests,³ one of which was the size of the corporation's "gross receipts." The issue here is whether there should be considered as part of petitioner's gross receipts the amounts of Federal and state excise taxes on beer which it claims increased the selling price petitioner received for its product. If the amount of the beer taxes is excluded from gross receipts, petitioner's figures show an increment to more than 150 per cent, which entitles it to use the growth formula. If they are included in gross receipts the percentage falls some ten points lower and the growth formula is inapplicable.

The general approach of the 1950 Act was apparently an attempt to determine growth by an

(ii) The total payroll of the taxpayer (as determined under paragraph (4)) for the last half of its base period is 130 per centum or more of its total payroll for the first half of its base period, or the gross receipts of the taxpayer (as determined under paragraph (5)) for the last half of its base period is 150 per centum or more of its gross receipts for the first half of its base period; or

* * *

²Sec. 713 (f), Internal Revenue Code of 1939 (Repealed by Sec. 122 (a), Revenue Act of 1945).

³See footnote 5 *infra*.

“increase” in “physical volume of production.”⁴ Probably recognizing the difficulties of using that measure directly, the result was sought to be accomplished by the use of one of two “automatic”⁵ tests: Either an increase of 30 per cent in payroll or an increase of 50 per cent in “gross receipts.” It is the meaning, and purpose of the use, of this term, which as to this issue is defined only as “The total amount received or accrued * * * from the sale * * * of stock in trade of the taxpayer * * *”⁶ which poses the instant question.

4“* * * The use of the alternative gross receipts test is justified by the fact that a corporation may increase its physical volume of production materially by introducing additional equipment and new operating procedures which do not involve a corresponding increase in its labor force * * *” [H. Rept. No. 3142, 81st Cong., 2d Sess., p. 24; S. Rept. No. 2679, 81st Cong., 2d Sess., p. 27.]

⁵Petitioner, in its brief, quotes as “relevant” two passages from the committee reports (H. Rept. No. 3142, *supra*, at pp. 16 and 17; S. Rept. No. 2679, *supra*, at p. 18), including the statements that tests applied under the wartime Act were “largely a matter of subjective judgment” and referring to the 1950 Act as providing “automatic formulas for each of the most important types of cases.” These statements were apparently made with reference to section 722. However, they may well represent the legislative frame of mind as applied to all the excess profits abnormality amendments.

⁶Sec. 435. Excess Profits Credit—Based on Income.

(e) Average Base Period Net Income—Alternative Based on Growth—

Bearing in mind that it is an increase in physical volume of production with which the lawmakers were concerned, as petitioner apparently recognizes in its excellent brief, the question is what effect should be given to unit taxes, the rate of which did not increase during the base period. It can be accepted that percentage or ad valorem taxes would be neutral in such a situation since presumably they would increase in the same proportion as the total amount received from sales, at least unless the rate changed during the period. Similarly, a unit tax not based on any percentage of the selling price

(5) **Gross Receipts**—As used in this subsection the term “gross receipts” with respect to any period means the sum of:

(A) The total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, and

(B) The gross income, attributable to a trade or business regularly carried on by the taxpayer, received or accrued during such period excluding therefrom—

(i) Gross income derived from the sale, exchange, or other disposition of property;

(ii) Gross income derived from discharge of indebtedness of the taxpayer;

(iii) **Dividends on stocks of corporations;**

* * *

and

(iv) **Income attributable to recovery of bad debts.**

would be neutral if the amount of the tax were increased during the base period in the same proportion that gross receipts increased. Petitioner's situation was different. It was subject to a unit, not an ad valorem, tax and the rate did not change during the base period but remained constant.

Neither the gross receipts test nor the payroll test, which is the alternative, are direct measures of physical volume of production. Gross receipts may rise at least in part due to an increase in the price of the commodity sold, as they did in the present case. Theoretically an increase of 50 per cent in the selling price might, without any addition to physical volume, create a statutory eligibility which was not actually intended. Similarly, a rise of 30 per cent in payroll might come about solely by an increase in wage rates with no improvement in physical volume. These possibilities were in the legislative mind but "the percentages used in the payroll and gross receipts tests" were deemed to be "sufficiently large so that only those taxpayers will be able to qualify whose business has grown substantially more rapidly than the average * * *"⁷ [Emphasis added.]

Petitioner suggests, we think correctly, that the tendency is to pass on to the consumer all possible costs of production. In ideal terms the growth formula will work best when all items of such costs, and, therefore, unit sales prices, remain static and any increase in gross receipts can hence be at-

⁷S. Rept. No. 2679, *supra*, at p. 27.

tributed solely to a growth in physical volume. The test selected by Congress must assume that most production costs will remain stationary, otherwise the formula adopted by it would have no direct relationship to any increase in the physical volume of production. By that test items which remain stable in their relationship to units produced, such as the taxes in the present case, do not throw the formula off nor make its workings inequitable. Nothing less would compel a departure from the literal statutory language.

Petitioner is in effect asking that we reject a simple and direct application of the term "total amount received" as including everything received by the corporation in its own right, and employ instead a meaning which will give effect to the statutory purpose. We need not determine whether such an approach is permissible. Even if it were, it seems to us that the object of the statute as shown by its legislative history will best be served by including all items actually received and particularly those which represent a stable and unchanging cost per unit.

On this approach to the meaning of the Excess Profits Tax provision, it is of no consequence whether the beer taxes are manufacturers' taxes or sales taxes. They were included in the amount received for its stock in trade by petitioner, and we see nothing in the statute or its background which will justify their elimination. It is not contended

that such taxes, particularly the Federal tax,⁸ are collected by the brewer as a trustee or fiduciary. While it may pass the economic burden of the tax to the purchaser, its failure to do so would not relieve it of the tax liability. *Lash's Products Co. v. United States*, 278 U.S. 175; *Liggett & Myers Co. v. United States*, 299 U.S. 383; *Shearer v. Commissioner* (C.A. 2), 48 F. 2d 552; *R. J. Reynolds Tobacco Co. v. Robertson* (C.A. 4), 94 F. 2d 167, certiorari denied 304 U.S. 563; *Casey Jones, Inc., v. Texas Textile Mills* (C.A. 5), 87 F. 2d 454; *Continental Baking Co. v. Suckow Milling Co.* (C.A. 7), 101 F. 2d 337; *Heckman & Co., v. I. S. Dawes & Son Co., Inc.* (C.A., D.C.), 12 F. 2d 154; *Consolidated Distributors v. City of Atlanta*, 193 Ga. 853, 20 S.E. 2d 421; *Western Lithograph Co. v. State Board of Equal.*, 11 Cal. 2d 156, 78 P. 2d 731; cf. *Indian Motorcycle Co. v. United States*, 283 U.S. 570; *Fresno Grape Products Corporation v. United States* (Ct. Cl., 1935), 11 F. Supp. 55; *F. Strauss & Son v. Coverdale*, 205 La. 903, 18 S. 2d 496; *Wayne County Produce Co. v. Duffy-Mott Co.*, 244 N.Y. 351, 155 N.E. 669. It cannot hence be said that amounts collected by petitioner, even though they effectively reimbursed it for the beer tax, were not its own "gross receipts."

Decision will be entered for the respondent.

Served July 19, 1956.

Filed and entered July 19, 1956.

⁸If the Federal tax is not eliminated, petitioner would not qualify even disregarding the state tax.

The Tax Court of the United States, Washington
Docket No. 53063

LUCKY LAGER BREWING COMPANY, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed July 19, 1956, it is

Ordered and Decided: That there is a deficiency in income and excess profits tax for the calendar year 1950 of \$102,343.94.

Entered July 23, 1956.

[Seal] /s/ CLARENCE V. OPPER,
Judge.

Served July 25, 1956.

Entered July 25, 1956.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 53063

LUCKY LAGER BREWING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Lucky Lager Brewing Company, a California corporation with its principal office and place of business in San Francisco, California, petitions for review of the decision of The Tax Court of the United States entered on July 23, 1956, ordering and deciding that there is a deficiency in income and excess profits tax for the calendar year 1950 in the amount of \$102,343.94.

Petitioner's return for the year in question was filed with the Collector for the Northern District of California in San Francisco. Petitioner files this petition for review by the Court of Appeals for the Ninth Circuit pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code of 1939, and of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

Nature of the Controversy

The case presents a single question, whether federal and state excise taxes collected by petitioner from its customers and paid by it as taxes to the United States and the State of California are part of its "gross receipts" for the purposes of the excess profits tax growth formula provided by Section 435(e) of the Internal Revenue Code of 1939.

The amount of petitioner's excess profits tax for 1950 depends on whether or not it is entitled to compute its earned income credit as a growth corporation under the provisions of Section 435(e). Its eligibility for recognition as a growth corporation depends on whether its total "gross receipts" for 1948 and 1949 are 150 per cent or more of its total "gross receipts" for 1946 and 1947, as petitioner contends. The Tax Court held that that ratio was less than 150 per cent. If that determination is correct, petitioner is not eligible for taxation as a growth corporation.

The critical term "gross receipts" is defined by subdivision (5) of Section 435(e). The section defines gross receipts as "amounts received * * * from the sale * * * of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer * * * or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, and the gross income attributable to a trade or business regularly carried on by the tax-

payer * * *” The question is whether the amount of excise taxes imposed upon the manufacture and sale of each barrel of beer by taxpayer should be included in the term “gross receipts” as so defined. The Congressional history indicates that the section was intended to measure the taxpayer’s growth in terms of volume of physical production. There is no uniformity of accounting practice as to the meaning of the term “gross receipts”; some taxpayers excluding excise taxes from gross sales reported to stockholders and upon income tax returns; other taxpayers reporting gross receipts, deducting excise taxes to arrive at a figure of net sales. The only thing that can be said without hesitation is that there is no uniformity of treatment on income tax returns or reports to shareholders.

Petitioner’s practice in the base period, in common with that of most other breweries, was to include beer excise taxes in gross sales but also to include them in cost of goods sold, which is deducted before arriving at gross profit. However, the general practice in the petroleum industry, the phonograph and television sales industries, and the retail industry is to exclude excise taxes from gross sales, in consequence of which those excise taxes do not appear in their income tax returns, or corporate reports to stockholders, or profit and loss statements.

The beer excise taxes are a flat figure per unit, not a percentage of sales price, and were not in-

creased in the base period. If they are includible in a brewery's "gross receipts," then in order to qualify as a growth corporation a brewery must increase its units sales more than would another corporation subject to an excise tax imposed as a percentage of dollar volume, and more than would another corporation in an industry not accustomed to reporting excise tax collections in its gross sales; also more than a corporation in an industry where the excise tax was increased in the base period. The question is whether such a discrimination between industries by reason of difference in excise taxes and between taxpayers because of varying accounting and tax-reporting practices was intended by Congress when it imposed the excess profits tax, or whether a test uniform in its application to all industries was what was intended.

The Tax Court held that the definition of "gross receipts" compelled the conclusion that the non-uniform, discriminatory test was the one Congress intended to adopt. Petitioner contends that that determination is erroneous and that excise taxes collected on the sale of a product, including beer excise taxes, were intended to be excluded from the "gross receipts" by which growth is measured.

Dated: September 25, 1956.

Respectfully submitted,

/s/ VALENTINE BROOKES,

/s/ ARTHUR H. KENT,

/s/ PAUL E. ANDERSON,

/s/ RUSSEL SHEARER,

Attorneys for Petitioner on
Review.

[Endorsed]: Filed Sept. 27, 1956, U.S.T.C.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: The Honorable the Commissioner of Internal
Revenue, Internal Revenue Service:

You Are Hereby Notified that Lucky Lager
Brewing Company, a California corporation, did
on the 27th day of September, 1956, file with the
Clerk of The Tax Court of the United States, at
Washington, D. C., a petition for review by the
United States Court of Appeals for the Ninth Cir-
cuit of the decision of The Tax Court entered on
July 23, 1956, in the above-entitled case. A copy of
the petition for review as filed is hereto attached
and served on you.

Dated: September 25, 1956.

/s/ VALENTINE BROOKES,

/s/ ARTHUR H. KENT,

/s/ PAUL E. ANDERSON,

/s/ RUSSEL SHEARER,

Attorneys for Petitioner on
Review.

ACKNOWLEDGMENT OF SERVICE OF NOTICE OF FILING PETITION FOR REVIEW

Service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 27th day of Sept., 1956.

/s/ JOHN POTTS BARNES,

C.W.R.

Chief Counsel, Internal Revenue Service, Attorney for Respondent on Review.

[Endorsed]: Filed Sept. 28, 1956, U.S.T.C.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE RECORD ON REVIEW

Petitioner hereby designates the entire record in The Tax Court as the record on review.

Dated: September 25, 1956.

/s/ VALENTINE BROOKES,

A.H.K.

/s/ ARTHUR H. KENT,

/s/ PAUL E. ANDERSON,

/s/ RUSSEL SHEARER,

Attorneys for Petitioner on Review.

[Title of Court of Appeals and Cause.]

ACKNOWLEDGMENT OF SERVICE OF
DESIGNATION OF THE RECORD ON RE-
VIEW

Acknowledgment of service of a copy of the
Designation of Record on Review is hereby made
this 2nd day of October, 1956.

/s/ JOHN POTTS, BARNES,
C.W.R.

Chief Counsel, Internal Revenue Service, Attorney
for Respondent.

[Endorsed]: Filed Oct. 3, 1956, U.S.T.C.

The Tax Court of the United States
Docket No. 53,063

In the Matter of:

LUCKY LAGER BREWING COMPANY, a Cor-
poration,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before: Honorable Clarence V. Opper, Judge.

Appearances:

VALENTINE BROOKES,
RUSSEL SHEARER,

Appearing for the Petitioner.

A. S. RESNIK,

HONORABLE JOHN POTTS BARNES,

Chief Counsel, Bureau of Internal Revenue,

Appearing for the Respondent.

* * *

FRED W. JORDAN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Court: State your full name for the record.

The Witness: Fred W. Jordan.

Direct Examination

By Mr. Brookes:

Q. Where do you reside?

A. In Redwood City.

Q. What is your occupation?

A. I am the Treasurer and Comptroller for the Lucky Lager Brewing Company. [19*]

Q. For how many years have you occupied those positions?

A. Since February 1, 1934.

Q. In that capacity, or in those capacities, what are your duties?

A. Well, I think the Comptroller is the main function I have in the brewery. I have charge of all the records of the company, and establish the accounting practice, with the help of our certified public accountants, and handle all finance matters for the corporation.

(Testimony of Fred W. Jordan.)

Q. I hand you Petitioner's Exhibit 6, entitled "Flow Sheet of Accounting Entries from Books."

Did you prepare this? A. I did.

Q. Will you explain to the Court and for the record what this document constitutes?

A. Well, it gives in graphic form, I believe you would call it, the accounts that are carried on the books of the company and shows the process in manufacturing from the start of the purchase of the raw ingredient through the various phases of manufacturing, from the raw material through the brew house where the beer is brewed and gotten ready for cellar storage, where the beer is aged, and from there it is transferred to the bottling or the canning lines to be packaged into various sized bottles and cases. [20]

After the bottles are filled and packed, they are sent over to the warehouse, and from the warehouse are shipped out of the brewery.

The beer that remains on hand is carried in inventory.

Q. Will you explain the significance of the lines which appear by arrows on this exhibit?

A. Well, the first bracket takes in the raw material cost, and the brewhouse costs.

Mr. Resnik: When you are talking of the first bracket, is that over to the right?

The Witness: Yes. At that point the beer has been brewed, so to speak, and it is then transferred into the fermenting tanks and to the storage tanks and kept in the big storage tanks at the brewery until the beer is ready for bottling or canning.

(Testimony of Fred W. Jordan.)

As the beer comes to rest in the cellars, there is a large bulk inventory which at that time is transferred—as you can follow the arrow here—to inventory beer in process, and then when beer has to be made ready for bottling and canning, it is withdrawn from the storage tanks and goes through the bottling operations and canning operations.

When that phase of it has been completed, if you follow the arrow again, “bottling cost” goes to bottled beer cost, right opposite bottling cost. [21]

I should have mentioned earlier that the direct beer cost from the cellars is also—I am getting myself mixed up here.

The beer cost under the heading of “bottled beer cost” is transferred out of the beer in process inventory, and the bottling cost and canning cost, when those operations have been completed, are also transferred to bottled beer or canned beer cost.

There is one further phase, the warehousing and shipping cost, where the beer is kept in inventory until it is shipped out, delivered, or for sale, and that cost of warehousing and shipping is transferred to the same bottled beer and canned beer cost, the cost accounts, which give you the total cost of the beer produced exclusive of taxes.

Then when all costs have been gathered in that account, they are transferred to the bottle beer cost and canned beer cost, and at that time under the system that was then in effect, the bottle beer tax, or I should say the beer tax, was then paid by Government stamps. If there was bottled beer in in-

(Testimony of Fred W. Jordan.)

ventory, it had also a federal tax that was related to it that went in in the related account, either bottled beer or canned beer tax, and for the purposes of the balance sheet, the two accounts were then combined into an inventory of finished beer.

In other words, there was first inventory cost of [22] beer, and as we call it, the inventory of federal tax, and they were combined then to give an inventory of finished beer.

Q. (By Mr. Brookes): When you referred, as you did several times, to the word "tax" to what tax or taxes did you have reference?

A. To the federal excise tax on beer.

Q. Did you mean to include the state excise tax on beer? A. No.

Q. Was any treatment accorded to any excise tax on beer in Exhibit 6?

A. There is no state excise tax considered in this accounting at all. The state excise tax is only paid when the beer is sold or delivered.

Q. In this exhibit, in the three columns farthest to the right, as well as in the column labeled "bottling costs," and that labeled "canning cost," appear the word "taxes."

What taxes are referred to there?

A. Real and personal property taxes for the City and County of San Francisco.

Q. Has there been any change in the internal system of classifying accounts, changes from that exhibits, since the change in beer tax regulations in March of 1950?

(Testimony of Fred W. Jordan.)

A. There is no change in these accounts. The procedure [23] is the same. The only difference is that there is no federal tax now shown as being related to any beer inventories.

Mr. Brookes: Your Honor, it is a stipulated fact among the exhibits to the stipulation in which appears several samples of bills of this taxpayer to its customers, and from which appears the stipulated facts that where the tax was due, it was not set forth as a separate item of charge on the billing to the customer.

I wish your Honor to know that because it is the premise of the next question I shall ask the witness.

Q. (By Mr. Brookes): Mr. Jordan, do you know why the company did not show the tax separately in its billing to its customers?

A. Only to the extent that it was a general procedure in all the brewing industry. They all showed their invoices with the total amount including both cost of beer and the federal tax and the state tax as well.

Mr. Resnik: I want to have your question clarified as to whether it included both federal and state taxes, but the answer stated that.

Q. (By Mr. Brookes): Do you know the reason for this custom in the beer industry?

A. No, I really don't. As far as I know, it has always been that way. [24]

Q. Do you know the reason that Lucky Lager followed this practice?

(Testimony of Fred W. Jordan.)

A. We had to be competitive, and I would say that we did the same as the others, and when we first started selling, the others were already in business and we followed, in a sense, their method of procedure.

Mr. Brookes: Before passing on, I should like to call your attention to the fact that among the stipulated exhibits are some in which sales have been made which were not subject to tax, not subject to state tax, or in some instances, not subject to the federal tax, by reason of being sales in export—in those instances the stipulated exhibits show a deduction of the tax, and a specification of what tax is being deducted in arriving at the final selling price.

That being stipulated, I shan't go into it with this witness.

Q. (By Mr. Brookes): Mr. Jordan, I hand you Stipulated Exhibit No. 2, Roman II. There is a lateral column entitled, "Discounts Received."

Will you please explain what the discounts received were?

Mr. Resnik: If your Honor please, I would refer the Court to the stipulation and would point out to the Court [25] that any inquiry as to that item is completely meaningless since its inclusion or exclusion from gross receipts, or partial inclusion or partial exclusion from gross receipts can't vary the formula. The taxpayer will either win the case with the beer tax in or out, and we would just make

(Testimony of Fred W. Jordan.)

a lot of progress if we could just dispose of those items which cannot affect the issue at all.

Mr. Brookes: I think the witness could have answered the question in the time it took Mr. Resnik to state his objection, and he could answer the next question in the time that it will take me to answer his objection.

It is true, as I stated in my opening statement, that the result of the case is not going to be affected one way or the other by the mathematics on any determination made by the other items. We are not in agreement with the Government about the classification of that item, or the next one, and others, but we put them in issue and they are in issue in the pleadings, which are part of the record in this case.

In order that there be no adverse or possible adverse implication drawn from our failure to state the reason for our objection to the classification that the Government has insisted upon in the case, I wish to have the witness testify as to the nature of these items, the figures of which are set forth in the stipulation. [26]

Mr. Resnik: It is because of what Mr. Brookes stated that I made my earlier statement to the Court. In view of the fact that some of the small items which are incorporated in the exhibit to the stipulation can't vary the result of the case, we had intended not to pursue it, and we would ask the Court, we would join with Mr. Brookes in asking

(Testimony of Fred W. Jordan.)

the Court that no inference should be drawn for one side or the other as to the inclusion or exclusion of any of those minor items.

What we have proposed at the outset was an attempt to get the case down to the nub, to the heart of the case, and we thought we might do that on a give and take basis.

We couldn't come to a final agreement, and we realized ultimately that it wasn't necessary to come to final agreement on a give or take basis, and for that reason some items are included, and if they were material in another case, no one knows what position might be taken, so I would ask the Court, even if the witness were permitted to testify, not to draw any inferences favorable or unfavorable therefrom.

The Court: I am not going to sustain the objection.

Mr. Brookes: This will be very brief.

The Court: Proceed.

Mr. Brookes: Will you read the question, Mr. Reporter, please?

(Question read.) [27]

The Witness: The discount received consists of the usual one or two per cent that you get from payment, either in 10 days or 30 days, or whatever the terms may have been. We have taken that in as discounts received on the record as income.

Q. (By Mr. Brookes): Mr. Jordan, Exhibit 2

(Testimony of Fred W. Jordan.)

has another column entitled "Interest on U.S. Bonds," in which figures appear for the years 1946 and '47, and none for 1948 and '49.

What was the reason that the taxpayer owned United States bonds in 1946 and '47?

A. The reason we owned those bonds was that the brewery then contemplated building another brewery in Azusa, Los Angeles County, and the money was used to purchase these bonds. When the time came that we were able to build, or got permission to build, these bonds were then cashed in and used for the building purposes, or the purchase of the land.

Q. Do you know whether or not there were price increases in the taxpayer's product during all the years 1946 to '49, inclusive?

A. Yes, there were.

Q. Do you know what those price increases amounted to?

A. 21.6 per cent, the over-all average increase for both bottled and canned beer. That is exclusive of the federal and state tax. [28]

Mr. Resnik: May I have the reporter read the answer to the last question?

(Answer read.)

Q. (By Mr. Brookes): For what period was that calculated?

A. For the 1946 and '47, as compared to the years 1948 through '49.

Mr. Brookes: Thank you. You may cross-examine.

(Testimony of Fred W. Jordan.)

Cross-Examination

By Mr. Resnik:

Q. Mr. Jordan, you just testified as to an increase in prices. Doesn't your company have a different price for the same product in different areas in the state of California? A. At this time?

Q. The years '46 to '49. That is the critical period in this case.

A. I don't recall. I think there were different prices at that time. I wouldn't be sure.

Q. Different prices for different areas?

A. That is right.

Q. And you had still different prices for the state of Nevada? A. Yes.

Q. So that when you stated that the prices increased 21 per cent, of what prices were you speaking? [29]

A. The total sales that were made throughout any area, exclusive of federal and state taxes.

Q. Do you mean that the prices in the Imperial area increased 21 per cent in the period?

A. No; the over-all average, whether it was in Nevada or Southern California or Utah, the price increase of the product was 21.6 per cent, exclusive of federal or state taxes.

Q. So in actuality, the price increase in Nevada might have been more or less than that?

A. It could have been, yes.

Q. You are merely talking of an average now?

A. Yes.

(Testimony of Fred W. Jordan.)

Q. Actually, the price that you get for beer is determined by many factors, is it not?

A. In what way?

Q. Doesn't competition set in to assist in the establishment of price?

A. Well, to meet competition, yes.

Q. Competition from other brewers?

A. Yes.

Q. Competition from other soft drinks?

A. I don't know.

Q. Competition from hard liquors and wines?

A. I don't know as to that; probably, yes. [30]

Q. Are you in that department of Lucky Lager Brewing which is concerned with the establishment and maintenance of prices?

A. Of determining prices for sale?

Q. Yes. A. No.

Q. You stated, Mr. Jordan, with reference to Exhibit 6, that personal property taxes on the beer appeared in some column. Will you explain that to us?

A. Brew house taxes, those represent real and personal property taxes.

Q. Isn't it a fact that in personal property taxes levied by the City and County of San Francisco, that you pay a personal property tax on the beer in the vat before it goes through the meter?

A. Whatever is in inventory, yes.

Q. And the tax on that is at a different rate than the tax on the beer after it has gone through the meter and the federal excise tax has been paid?

(Testimony of Fred W. Jordan.)

A. Would you state that again, please?

Q. Do you know how the personal property tax for the City and County of San Francisco is levied on the brewer?

A. Yes; we issue a report each year.

Q. Give them a report of the beer in the vats, don't you? [31] A. Yes.

Q. And they assess a certain tax on that, generally based upon cost? A. That is right.

Q. And the cost upon the beer in the vat is cost less the federal beer tax, is it not?

A. That is right.

Q. Did you say you haven't paid the federal beer tax? A. That is right.

Q. But once that beer went through the meter, before it went into the bottling house in the period 1946 to '49, the federal tax became due, did it not?

A. As it went through the meter, yes.

Q. So when the personal property tax was assessed on the beer, it had passed through the meter, they determine the tax on a cost inclusive of the federal tax, do they not?

A. I suppose they did. I don't know their exact method of evaluating it.

Q. Now, then, referring again to Exhibit 6, can you tell us where on that exhibit the state beverage tax appears? A. State beverage tax?

Q. Yes.

A. There is no state beverage tax in any of these accounts. That tax did not apply until the sale or delivery was made. [32]

(Testimony of Fred W. Jordan.)

Q. I show you an exhibit attached to the stipulation which I believe to be Roman number V, the first sheet of which is entitled, "Account No. 93, Sheet No. 1, Operating Ledger, State Beverage Tax Payable."

A. That is right.

Q. Referring to that sheet, we see thereon in the first block, that some portion of the state beverage tax went to bottled beer cost of sale?

A. Right.

Q. Part of it went to canned beer?

A. Right.

Q. Where do the legends comparable to the legend "Bottled Beer Cost of Sales" and "Canned Beer" appear on Exhibit 6?

A. They do not appear on this exhibit. They appear on the income and expense statement. They are charged to the income or expense in the month in which that tax liability is accrued, and this represents the liability which was usually paid in 15 or 30 days later.

Q. So Exhibit 6, although denominated a flow sheet of accounting entries, from the books of Lucky Lager, is incomplete, is it not?

A. Well, this is a manufacturing flow of accounts, and the ultimate conversion of all the materials and the labor into inventory. The state tax only applies when that [33] beer is taken out of inventory and sold.

Q. Or delivered? A. Yes.

Q. Where do your federal social security taxes appear on Exhibit 6?

(Testimony of Fred W. Jordan.)

A. You find those on about the fifth row from the bottom. They are all labeled "social security taxes."

Q. Referring again to Exhibit No. 5, the beverage taxes table, notwithstanding that the state beverage taxes payable do not appear on Exhibit 6. Nevertheless the state beverage taxes are a charge to the cost of beer sold, are they not?

A. That is the way we treated it on the records, yes.

Q. Mr. Jordan, with reference to the federal excise taxes, particular during the period here material, the years 1946 to 1949, if any of the beer was destroyed after it left the bottling house, not before, but after it left the bottling house, there was no opportunity for recovery of that tax, was there?

A. Are you speaking of the period 1946 through '49?

Q. Yes.

A. In the event, when you say "after it left the bottling house," do you mean it got outside the brewery premises?

Q. Yes. [34]

A. There was no refund then.

Q. At one time there was a change in the law, however, to give you some allowance for spillage within the bottling house? A. Yes.

Q. And after March of 1950, there was a further change as to the time when you could pay your tax? The bottling house was then brought upon the bonded premises, is that not the case?

(Testimony of Fred W. Jordan.)

A. That was March 1, 1950. The tax was still paid by stamp, but it was only paid on that packaged merchandise which left the brewery premises.

Q. What about the beer that left the bottling house but was not delivered for consumption or sold, but was just stored? That was stored tax paid, was it not?

A. During the 1946 through 1949 period.

Q. And even after March 1 of 1950?

A. No, not after March 1, 1950, because the tax only applied after the beer was delivered or sold.

Q. Let me see if we can make the question clear. Let's take the period after March 1 of 1950.

A. Yes.

Q. The beer has gotten into the bottling house and is bottled? A. Yes. [35]

Q. It then passes along a moving line, past some electronic counters, which counters are there for the purpose of determining how much tax has to be paid and the tax is then paid, is it not?

A. Not at that time. March 1, 1950, changed the manner of tax payment. The beer was still paid by stamp, but the stamps were not cancelled until the beer had actually moved off the bonded premises.

Q. Moved off the bonded premises, but it could still move into a warehouse and remain unsold, could it not?

A. In our own warehouse on bonded premises. All our premises were bonded. We did not pay any tax.

(Testimony of Fred W. Jordan.)

Q. Did you ever maintain an inventory of finished beer?

A. Outside of the brewery premises?

Q. Yes.

A. Not to my recollection during those years.

Q. What about the inventory on the brewery premises?

A. There would be no need for—there would be no federal tax paid on them. It was in inventory and the stamps, as I say, the payment did not have to be made until the beer was delivered.

Q. But prior to March 1 of 1950, and during all the period here material, the tax was paid on the beer even before it reached the bottling house; is that correct? [36]

A. It was paid when it got into the bottling house tanks, when it was transferred from the cellars and put into the bottling tanks, and the tax was then paid, or we had stamps on hand to cover it.

Q. In fact, there was a meter just outside the bottling house which checked the amount of beer that flowed through, and at that point of time the tax was paid?

A. That is right; that is March 1, 1950.

Q. Directing your attention to Roman Exhibit III, to the stipulation, these being invoices of Lucky Lager Brewing Company, and directing your attention to an invoice of beer shipped to Sacramento, California, what unit price of \$2.56 was indicated thereon—that price of \$2.56 includes not only the federal excise tax but the state tax as well?

(Testimony of Fred W. Jordan.)

A. That is correct.

Mr. Resnik: No further questions.

Redirect Examination

By Mr. Brookes:

Q. Did you testify that this flow sheet, Exhibit No. 6, is a statement of the accounts as they appeared during the years 1946 to 1949, inclusive?

A. Were they in this manner?

Q. Yes. A. Yes.

Q. If a flow sheet similar to this were [37] prepared, showing the way in which the accounts were maintained in 1951, for example, or any period after March 1, 1950, would there have been any figures or any names or identification representing the federal beer tax?

A. Speaking of 1950 now?

Q. After the change in March of 1950?

A. The beer tanks then would have been the same, handled in the same manner; that is, recording the state excise tax, because then it applied on delivery, and these accounts that are here shown, the inventory of bottled beer, federal tax and canned beer federal tax, none of them would appear.

Q. You testified, Mr. Jordan, as to the way and time at which the federal beer tax was paid in the base period, 1946 to 1949, and prior to the change in March of 1950, and that the tax was paid at the time that the beer was withdrawn from tanks and placed in containers for sale.

(Testimony of Fred W. Jordan.)

Was there any provision under which the company could get refunds in the event of spillage, breakage, or anything of that nature, after the bottling?

A. Again, this is the base period?

Q. Yes.

A. Yes. If we set aside short fills or foreign matter might have got into the bottles, those were set aside. Then under the practice, we would ask the Alcohol Tax Unit at that [38] time for an inspector to come out and witness the destruction of that beer, under his supervision. He would determine how much gallonage or barrels we had there and refund the tax, based on the barrelage that was destroyed or dumped down the sewer.

Mr. Brookes: That is all.

Recross-Examination

By Mr. Resnik:

Q. After March 1, 1950, you stated that the federal beer tax would not have appeared on Exhibit 6? A. Right.

Q. Would it not have been handled in the same manner as the state beverage tax was handled prior thereto and still be reflected as a charge against cost of sales?

A. No; it was reflected differently. We were still required to buy federal stamps, the same as we did in the years before. The only difference was in the method of collecting that tax. In the base period, the beer was metered and we have to pay on the

(Testimony of Fred W. Jordan.)

meter, whatever the meter showed. After that, March 1, 1950, the tax was paid with the stamps, but only on the beer that left the premises. Therein lay the difference.

Under the prior method we had to pay it regardless, on the meter reading. After March 1, 1950, we paid it on the beer that was actually bottled in containers and was delivered [39] or sold and left the plant.

Q. How was the federal tax recorded on your books of accounts after March 1, 1950?

A. First of all, the revenue stamps were purchased and it was charged to revenue stamps on hand. Then each day, or the next following day after operations, the tax was determined that was due and payable on the shipments and sales that had been made on the prior days, and the equivalent in federal excise tax stamps was cancelled and sent down to the customs collector, or whoever it was.

Q. Did that charge find its way into your cost of goods sold?

A. At that time it had the same treatment, or showed up in the accounts then in the same manner that the state excise tax showed. It became a deduction directly from income. It never went into any inventory.

Q. So that it did finally wind up as an inclusion in cost of goods sold? A. That is right.

Mr. Resnik: No further questions.

Mr. Brookes: That is all.

(Witness excused.)

Mr. Brookes: By way of explanation, it is a stipulated fact, and for that reason I asked no questions of this witness on the point—the federal beer stamps on [40] hand during the base period purchased but not affixed or destroyed or mutilated were, according to the stipulation of facts, not carried as an item in inventory, but were carried in the balance sheet as a separate classification, separate heading under “General Classification—Current Assets.”

I should like to call for examination Mr. Walter M. Baird.

Whereupon

WALTER M. BAIRD

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Walter M. Baird.

Direct Examination

By Mr. Brookes:

Q. What is your address?

A. My business address is 120 Montgomery Street.

Q. What is your occupation?

A. Certified Public Accountant.

Q. How long have you been a certified public accountant?

A. I have been certified for 16 years.

Q. And have you practiced accountancy longer than that? [41]

A. For 19 years.

(Testimony of Walter M. Baird.)

Q. Have you a professional association with an accounting firm? A. Yes.

Q. What is the firm?

A. Price, Waterhouse and Company.

Q. What is your position with that firm?

A. I am a partner.

Q. What are your duties with that firm?

A. I, together with my other partners in San Francisco, have general supervision over the work done by our San Francisco office for our clients, which includes the audit of their financial statements, general accounts, and accounting tax accounting advice, and other advice to our clients as is normally associated with offices of certified public accountants.

Q. Does your firm have offices in other cities?

A. Yes.

Q. How many in the United States, Mr. Baird?

A. About 30.

Q. How many national partners does the firm have?

A. 61, including two outside of the United States.

Q. Does that include you? A. Yes.

Q. Does your San Francisco office have any clients [42] which are subject to state and federal excise taxes? A. Yes.

Q. Have you worked on the accounts of such clients? A. Yes.

Q. Do you know how such excise taxes are customarily classified in accounting practice?

(Testimony of Walter M. Baird.)

Mr. Resnik: I object, your Honor, until we have a specification of the particular type of tax and the company we are concerned with. Otherwise the answer would be completely meaningless and the question is too broad and not relevant to the issue in this proceeding.

Mr. Brookes: I think this witness has been shown to be an expert on accounting practices and accounting customs and matters of accounting generally. It is true that I didn't ask him which excise taxes were customarily classified in which way. Perhaps that will come out in the answer to the question.

I have been careful, perhaps too careful, not to be appearing to lead this witness, and I have no objection to specifying the excise taxes about which I should like an answer, if I can be assured that I won't then be faced with the objection that I was leading the witness.

Mr. Resnik: We haven't even established that this witness is familiar with the brewing industry or that he is the accountant for Lucky Lager. [43]

Mr. Brookes: I will ask him if their firm is the accounting firm for Lucky Lager Brewing Company, the taxpayer in this case.

The Witness: Yes.

Q. (By Mr. Brookes): Are you familiar with the account of that client? A. Yes.

Q. When you stated that your San Francisco office has clients which are subject to state and

(Testimony of Walter M. Baird.)

federal taxes, were you referring, among others, to Lucky Lager Brewing Company? A. Yes.

Q. And when you stated you had worked on the account of such clients, were you including Lucky Lager Brewing Company? A. Yes.

Q. Were you also including corporations engaged in the petroleum industry and selling refined petroleum products? A. Yes.

Q. Were you also including corporations that were engaged in selling at retail, such as department stores? A. Yes.

Q. Is there another type of client subject to federal and state excise taxes that should be added to that list on whose affairs you have worked?

A. We mentioned oil companies and department stores. [44] I might mention grocery stores as another type of retail establishment. Those are all I can recall at the moment. I think I am familiar with some practices in other industries.

Q. Do you know whether all excise taxes are customarily classified in accounting practice in the same way?

Mr. Resnik: I object, your Honor. I don't believe we have any issue in this proceeding requiring the testimony of an expert accountant as to how other excise taxes may be classified by other taxpayers in relation to other problems. We have here a narrow issue of the determination of gross receipts by a specific taxpayer under the specific facts here in issue under a specific statutory provision levying the tax upon beer.

(Testimony of Walter M. Baird.)

The Court: Overruled.

Mr. Brookes: Mr. Reporter, will you read the question to the witness?

(Question read.)

The Witness: They are not.

Q. (By Mr. Brookes): Is the accounting practice to include some excise taxes in gross sales in the ordinary——

Mr. Resnik: I object.

Mr. Brookes: May I finish the question?

Q. (By Mr. Brookes): ——in the ordinary corporate income tax return? [45]

Mr. Resnik: I object on the same ground as before mentioned. If I can have a continuing objection to the line of questioning——

The Court: You will have to make your objection each time because I won't know when it is going to end.

Overruled.

The Witness: Different excise taxes are treated differently.

Q. (By Mr. Brookes): My question was whether it was accounting practice to include certain excise taxes in gross sales in the ordinary corporate income tax return?

A. Some excise taxes are included in gross sales in corporate income tax returns; some excise taxes are customarily by trade practice excluded from gross sales in corporate income tax returns.

(Testimony of Walter M. Baird.)

Q. When some are included and some are excluded from gross sales in the corporate income tax returns, would similar practice of inclusion or exclusion be followed in reports to stockholders or other reports that are made in general accounting practice under regularly accepted accounting customs and practices?

Mr. Resnik: I object, your Honor. I don't see how that has any materiality to the issue in this case. The question is broad, not even related to a particular type of business or enterprise and wouldn't have any connection with [46] this taxpayer whatsoever, nor has there been any specification of a period of time or the nature of the tax being discussed.

The Court: Overruled.

Q. (By Mr. Brookes): Which excise tax—excuse me.

A. It would be usual for the reports to stockholders to be prepared in the same manner.

Q. Mr. Baird, which excise taxes are customarily excluded from gross sales in these reports?

A. It is customary for petroleum companies to exclude their excise taxes. It is customary for retail establishments to exclude the retail sales tax, both state and city. It is customary for retail establishments to exclude so-called luxury taxes, such as furs. It is customary in the amusement business to exclude the admissions tax from revenues. It is customary to exclude the excise tax on phonographs and television sets from gross sales.

(Testimony of Walter M. Baird.)

Q. Mr. Baird, that is a federal excise tax to which you last referred, is it not? A. Yes.

Q. And when you referred to the excise tax on the petroleum industry, were you referring to both federal and state excise taxes? A. Yes.

Q. And how are those excise taxes treated which are [47] not excluded from gross sales?

A. They do not appear in either sales or expenses. They are excluded from both in any report.

Q. But I meant to ask about those excise taxes which are not among those which are excluded from gross sales; wherein and how do they appear in the tax returns and in the corporate reports?

A. They will appear in different ways. They may appear as part of the cost of goods sold. They may appear as a separate deduction from the gross sales to arrive at a net sale, which is the case that is often found, in order to arrive at net sales, which is the usual test that is given in a comparison of the company's growth.

They may appear in the tax return as an item of tax, so-called, "below-the-line" deduction. I have even seen it appear on Line 1 as a separate deduction from sales; as you know the Line 1 setup on the tax return. Therein the taxpayer had to write in the word "taxes" because it isn't provided for in the form.

Those are various places it occurred and how they are treated.

Q. Do you know how the federal and state excise

(Testimony of Walter M. Baird.)

taxes have been treated by Lucky Lager Brewing Company? A. Yes.

Q. And do you know how those federal and state excise [48] taxes have been treated by other leading brewers in 1946, the first of the years with which we are concerned, and subsequently?

A. Yes. Your Honor, may I refer to a memorandum to refresh myself as to numbers, here?

Mr. Resnik: May I see the memorandum, please?

The Witness: Yes.

Mr. Resnik: May I have the witness on voir dire, if he is going to refer to it?

The Court: It is not being offered as an exhibit.

The Witness: I had a summary made for me of nine breweries which filed financial statements with the Securities and Exchange Commission for 1946.

Q. (By Mr. Brookes): And later years?

A. Through 1954, as a matter of fact.

Of those six in 1946, and seven in all other years, through 1954, in their profit and loss statement included in Form 10-K, Securities and Exchange Commission, treated the state and federal excise taxes as a separate deduction from gross sales to arrive at net sales.

Q. How were the others treated, Mr. Baird?

A. One of the others included the taxes in gross sales and showed as a deduction from gross sales to arrive at a figure of gross profit, the sum of two items, one entitled [49] "Cost of Goods Sold, or

(Testimony of Walter M. Baird.)

Product Sold," and two, "State and Federal Excise Taxes."

The ninth one included the excise taxes in gross sales and included the excise taxes; the debit in cost of goods sold, and a footnote thereto stating that it included excise taxes of "X" dollars.

Q. In which of those categories does the system of classification of accounts fall which is similar to that which Lucky Lager uses?

A. The final one I described.

Q. As a matter of accounting theory, is any one method to be preferred over any other method?

Mr. Resnik: If your Honor please, I object. I don't believe we have any issue here with reference to a better or poorer method of accounting procedure. We have an issue arising of a provision of the Internal Revenue Code which this Court will construe, and any construction given it by a certified public accountant can't advance its meaning insofar as the issue in this case is concerned.

I submit the question is irrelevant, incompetent to any issue in the proceeding.

The Court: Overruled.

Mr. Brookes: Would you read the question to the witness?

(Question read.) [50]

The Witness: The survey produced three different results. In nine breweries, all of which filed Securities and Exchange Commission reports, all of those financial statements had to have been re-

(Testimony of Walter M. Baird.)

ported upon by independent public accountants. Therefore, it would appear that any of them is acceptable accounting treatment.

However, I am very much impressed by the fact that 7 out of the 9 treated it in one manner.

Q. (By Mr. Brookes): Mr. Baird, you testified previously that the sales tax, the state sales taxes in California, I presume, and the federal and state gasoline distributors' taxes, and others that you enumerated, were examples of excise taxes which, under customary accounting practice, are excluded from gross sales in taxes on other corporate reporting.

Are they excluded from gross sales as regularly when the product is sold first to a distributor by the manufacturer or taxpayer, and then sold by the distributor to the consumer, as they are when the product is sold by the manufacturer directly to the consumer?

A. There is no distinction made as to who the buyer was.

Q. Did I understand you to testify that in the case of sales taxes in California, and the city sales taxes in California, that these sales taxes are excluded from gross [51] sales in corporate reporting?

A. Yes.

Q. Do the collections of sales taxes by retailers actually correspond to the amount excluded from gross sales in these reports?

A. Not necessarily; sometimes the amount collected isn't even known.

(Testimony of Walter M. Baird.)

Q. Why is there no correspondence between collections and the excluded amount?

A. As an example a chain grocer whose sales include not only taxable items, but not taxable, may well not keep track of the taxable items, and the non-taxable items that he sells, but when it becomes necessary for him to file his tax return, he takes his collections, which would include both the amount to which the products are sold and the taxes that he did collect from his customers, and he applies a percentage to that, which is a percentage agreed upon with the State Board of Equalization as to the proportion of his sales which should be considered to be taxable, and those which should be considered to be non-taxable.

That percentage is arrived at by an analysis of purchases. That percentage has been applied to his total collections, which will then give the assumed taxable sale, 3 per cent, that is thereby computed, and that is the amount he pays to the state government for his retail sales. [52]

Q. Is this confined to the instances of grocery stores, or does it apply in the case of department stores or other retailers as well?

A. It applies to a case even where those establishments do keep track of the actual amounts of tax they collect from the customer; they are obligated to pay to the state three per cent of their sales whether or not they have collected it from the customer. There is always an overage or shortage.

(Testimony of Walter M. Baird.)

Q. Why is that?

A. For example, on a 15 cent purchase in the state of California, you pay one cent sales tax, where actually three per cent is only .45 of one cent, thereby the store collects .55 of a cent too much. On \$1.10 it is 3.00, so there is always a plus or minus.

Q. Does this non-correspondence of collections with amounts excluded from gross sales in the case of these retailers result in any improper reflection of net income?

A. Not a bit; it has no effect on net income.

The Court: Let's take a recess.

(Short recess taken.)

The Court: Proceed.

Cross-Examination

By Mr. Resnik:

Q. You testified that some analysis was made for you [53] of the method of treatment of federal and state beer taxes by nine breweries. In each of those nine cases what source of information was used?

A. Form 10-K, filed with the Securities and Exchange Commission.

Q. It wasn't a federal income tax return?

A. No.

Q. In each of those instances, did you not find

(Testimony of Walter M. Baird.)

that the figure of gross sales which appeared thereon included the federal and state beer taxes?

A. It did, except that in one case of Krueger in 1946, which is parenthetically noted.

Q. Wasn't that stated as follows: "Income from sales net after returns and allowances and less federal and state excise taxes"——

A. I think that is what it said. May I look at my copy now?

Q. Yes. A. Yes, you are correct.

Q. You testified that it is not unusual for reports to stockholders, or perhaps even other certified statements, to be at variance with the method of reporting income receipts and deductions for tax purposes; is that correct? A. Not exactly.

Q. Let me ask you this: Doesn't it occur with some [54] degree of frequency that companies will publish statements to stockholders, make statements to banks, or to other interested parties on a basis that are variance with the method of reporting for federal tax purposes?

A. I should like to answer that this way: The taxable income is not necessarily reported income.

Q. So that statements to stockholders could and sometimes are prepared on bases different from the accounting for tax purposes?

A. I can say that this reporting to stockholders is necessarily in agreement with the company's books, and the only variations from that would be the particular statutory differences provided for in the income tax accounts, which are contrary to gen-

(Testimony of Walter M. Baird.)

eral accepted accounting principles where the tax law is wrong.

Q. Well, Commissioner Andrews might want to correct that.

A. Well, Congress tried to last year and didn't get very far.

Q. Does your company represent any other local brewers? A. No.

Q. Does your company represent any other brewers throughout the country?

A. Yes. [55]

Q. What brewers do you represent?

A. The only ones that come to my attention—I haven't made a study of this—is Pabst.

Q. Did you see their tax returns for the period here material? A. No, I have not.

Q. Were you able to ascertain how Pabst reported its gross receipts?

Mr. Brookes: Your Honor, I have to object to Mr. Resnik's attempting to bring out information which is confidential in nature with respect to Mr. Baird's clients, whom he has seen fit to ask Mr. Baird to name, other than this taxpayer. Mr. Baird's testimony has been in terms of customary practice, except to the extent that names and figures would appear from published reports in the Securities and Exchange Commission, and I don't believe it is relevant. Therefore, it isn't necessary to cause a violation of confidential relationship, which accountants and auditors have to their clients to require that there be a disclosure of the names of particular

(Testimony of Walter M. Baird.)

clients of Mr. Baird's firm, and their policies, particularly in respect to their tax purposes, as to which there is a secrecy statute that would keep us from producing the tax returns, if we could get them.

Mr. Resnik: I know of no privilege between client and accountant that prevails in the tax court, your Honor. [56]

Mr. Brookes: I was not speaking of technical legal privilege. I recognize there is none.

The Court: I think this is something that can be claimed only by the witness. Had I known there would be any question of not going into details, I would have sustained the objection when it was made in the first place.

I don't see how a witness can be allowed to testify generally, and the minute he is asked to go into details so they can be checked and verified, he hides behind some sort of privilege.

Mr. Brookes: Your Honor, he can't, but I do believe that Mr. Baird has disclosed to Mr. Resnik the information from which he testified, which was on the sheet he carried in his pocket.

In addition to that, he testified that there was one taxpayer whom he knew of from his experience who included on his tax return that Mr. Baird had seen, in the first line, the deduction from sales in arriving at net sales for the figure of federal excise taxes.

Certainly I concede Mr. Resnik is entitled to go into that. I think he will find it was not Pabst. He

(Testimony of Walter M. Baird.)

is asking him about details on which I think Mr. Baird did not base any of his general testimony.

The Court: I think you asked Mr. Baird questions about whether he represented brewers, people in the field of [57] paying excise tax. He said he did, and then some general questions were based upon his experience in that field. My recollection is that there was an objection made and I overruled it.

I am not going to sustain your objection at this point, unless you are willing to withdraw that line of questioning.

Mr. Brookes: Your Honor, I believe my line of questions was permissible.

The Court: I think it was, too.

Mr. Brooks: I can't withdraw it, your Honor. In that event, I think I will have to stand on the objection and if your Honor sees fit to overrule it, I shall sit down promptly.

The Court: Overruled.

The Witness: The question is how Pabst treated that?

Q. (By Mr. Resnik): Yes.

A. It is my recollection in the published accounts—and I have never visited their offices nor seen their books or worked on their accounts—that they have treated that the same way that Fort Pitt Brewing Company has done in their statement, which was including it in gross sales and cost and expenses. [58]

Q. Do you know of any brewer who did not include in gross sales the total proceeds he received

(Testimony of Walter M. Baird.)

for his beer? A. No.

Q. Do you know of any brewer who did not subtract out of gross sales, either under the general legend "cost of goods sold," or some more specific legend, the excise tax?

A. Yes, indeed. I think it is a great distinction between drawing them down before you arrive at net sales and putting them into cost of goods sold—all the difference in the world.

Q. Perhaps we can clarify this. As I understand it, of the nine brewers whose reports you have looked at from the SEC files, and not from the tax return, you found that they included within cost of goods sold, the federal and state excise taxes on beer?

A. No. They did that in the case of one, and that is the ninth example. In the case of the seven to which I referred, they did not include the beer and excise taxes as an item under cost of goods sold. It was treated as a separate deduction from gross sales to arrive at net sales, and there is a great distinction.

Q. But you found no brewer who treated the excise taxes as a deduction of taxes below the line, if I am using the correct accounting phrase?

A. Below the line is not an accounting concept. [59]

Q. On the tax return?

A. I have not seen the tax returns of these nine brewers.

(Testimony of Walter M. Baird.)

Q. In no case did you find a complete elimination of excise taxes as you did find in the case of some state sales taxes?

A. That is true. The items were disclosed in these nine.

Q. You testified as to some practice within the petroleum industry, as to the exclusion of excise taxes. I believe that was your language, that they excluded excise taxes? A. Yes.

Q. How did they exclude their excise taxes?

A. The item of excise tax is not shown either in sales or as a separate deduction from sales, or as a part of cost of goods sold, or as a part of expenses.

Q. What is the nature of those excise taxes that you were speaking of?

A. Federal and state gasoline taxes, primarily; lubricating oil tax.

Q. The federal gasoline tax is a tax on the consumer?

A. I wouldn't feel qualified to say.

Q. You don't know of the nature of the federal and state excise tax on beer, then? [60]

A. Well, I am not a lawyer, I am an accountant. I don't want to start indicating that I understand the legal technicalities of whom the tax is upon. From a good accounting standpoint, it is not too material.

Q. As an accountant, would you say that the term "gross sales" encompasses a broader area than "net sales"? A. Yes.

Q. As an accountant, would you say that the

(Testimony of Walter M. Baird.)

term "gross receipts" encompasses a broader area than "gross sales"?

A. The term "gross receipts" is one that is not clearly defined in accounting. It doesn't have much meaning. Gross receipts to me could entail anything that you put into the bank account, including the borrowing from a bank as a cash receipt, so I don't think you will find, in accounting, the precise definition of "gross receipts." I think accountants look more to sales and to net sales, the way the accounts are usually kept.

Q. So none of your testimony which you have given us here today relates to the question of whether accounting-wise or otherwise, federal and state beer excise taxes should or should not be included in gross receipts?

A. I testified as to what is included normally in gross sales and in net sales.

Q. But not as to gross receipts? [61]

A. I wasn't testifying as to what the law says as to what gross receipts shall include.

Mr. Resnik: I have no further questions at this time.

Mr. Brookes: No further questions of Mr. Baird.

Mr. Resnik: Respondent has no witnesses to offer.

The Court: I don't know that the Petitioner rested.

Mr. Brookes: Your Honor, Mr. Resnik anticipated what I am about to do.

The Court: Before we let this witness leave,

(Testimony of Walter M. Baird.)

there is some reference in one of Mr. Resnik's questions to a name that appeared on a paper that was given him by this witness. That paper isn't in evidence, and I don't say it should be, but I am a little concerned about the way the record will look with that thing hanging in mid-air.

Q. (By Mr. Brookes): Mr. Baird, is that the sheet to which you were referring in your testimony? A. Yes.

Q. Is that the paper from which the figures and the classifications about the practices of different brewers was taken in your testimony?

A. Yes. May I add that in order that no one be deceived as to these nine, these were drawn at random from [62] the breweries, which filed with the SEC. There was no attempt to get certain types. They were drawn at random.

Mr. Brookes: I offer this in evidence, your Honor. That will be Petitioner's Exhibit No. 7.

Mr. Resnik: No objection.

The Court: Received and marked in evidence.

The Clerk: Petitioner's Exhibit 7 admitted in evidence.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 7.)

(Witness excused.) [63]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record," including exhibits I thru V, attached to the Stipulation of Facts and Petitioner's Exhibits 6 and 7, admitted in evidence, in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of October, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15334. United States Court of Appeals for the Ninth Circuit. Lucky Lager Brewing Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: October 19, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15334

LUCKY LAGER BREWING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD TO BE
PRINTED

The point on which petitioner intends to rely is as follows:

Amounts collected by petitioner from its customers to reimburse it for federal and state excise taxes on beer are not part of its "gross receipts" for the purposes of Section 435(e) of the 1939 Internal Revenue Code, and consequently the Tax Court erred in denying petitioner the right to compute its excess profits tax credit on the alternative basis allowed to growth corporations.

Petitioner designates the following portions of the record for printing:

1. The petition to the Tax Court.
2. The answer.
3. The stipulation of facts, excluding all exhibits thereto except the following portion of Exhibit I, which shall be printed: the caption and lines numbered 1 through 15, inclusive, on page 1 of the

United States Corporation Income Tax Return for each of the years 1949 and 1950.

4. The oral testimony of witnesses Jordan and Baird at the trial held on October 4, 1955, as appearing on pages 19 to 63, inclusive.

5. Exhibit 7.

6. The findings of fact and opinion of the Tax Court, filed July 19, 1956.

7. The decision of the Tax Court entered July 23, 1956.

8. The petition for review.

9. The notice of filing petition for review, with acknowledgment of service.

10. Designation of the record on review filed with the Tax Court on October 3, 1956, together with acknowledgment of service thereof.

11. This statement of points and designation of record to be printed.

12. Any counter-designation by respondent.

13. Any stipulation of the parties which may be hereafter filed concerning unprinted exhibits constituting part of record on review.

Dated at San Francisco, California, October 25, 1956.

Respectfully submitted,

/s/ VALENTINE BROOKES,

/s/ ARTHUR H. KENT,

/s/ RUSSEL SHEARER,

Attorneys for Petitioner.

[Endorsed]: Filed October 26, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBITS
NOT PRINTED

The parties hereto, through their counsel, stipulate as follows:

All exhibits contained in the record transmitted to this Court by the Tax Court may be referred to and relied on by either party as constituting part of the record on appeal, whether or not printed in whole or in part.

Dated: November 1, 1956.

/s/ VALENTINE BROOKES,

/s/ ARTHUR H. KENT,

/s/ RUSSEL SHEARER, V.B.
Attorneys for Petitioner.

/s/ CHARLES K. RICE, J.
Assistant Attorney General,
Attorney for Respondent.

[Endorsed]: Filed November 7, 1956.

No. 15,334

IN THE
United States Court of Appeals
For the Ninth Circuit

LUCKY LAGER BREWING COMPANY,
a corporation,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Review of The Tax Court of the United States.

PETITIONER'S OPENING BRIEF.

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1. The first of these is the fact that the American Medical Association is a voluntary association of physicians and surgeons.

2. The second is the fact that the American Medical Association is a non-profit-making organization.

3. The third is the fact that the American Medical Association is a representative organization of the medical profession in this country.

4. The fourth is the fact that the American Medical Association is a body which has the confidence and respect of the public.

5. The fifth is the fact that the American Medical Association is a body which has the ability to carry out its duties in an efficient and economical manner.

6. The sixth is the fact that the American Medical Association is a body which has the power to bring about reforms in the medical profession.

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No. 15,334

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LUCKY LAGER BREWING COMPANY,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Review of The Tax Court of the United States.

PETITIONER'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This case was instituted by a petition filed in the Tax Court within ninety days of the date on which the deficiency letter was mailed (R. 3, 5). Decision of the Tax Court was entered on July 23, 1956, finding a deficiency in income and excess profits tax for the calendar year 1950 in the amount of \$102,343.94. On September 27, 1956, petitioner filed a petition for review by this Court and served notice thereof on the Commissioner of Internal Revenue. (R. 4, 49, 50-54.) The jurisdiction of this Court is founded on Sections 1141 and 1142 of the Internal Revenue Code of 1939 and Sections 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE.

The facts stipulated or found by the Tax Court may be summarized as follows:

Petitioner is a California corporation which brews and sells beer (R. 35). Its principal place of business is in San Francisco (R. 26), and it filed its returns for all years involved with the Collector of Internal Revenue for the Northern District of California (R. 35). It keeps its books and files its tax returns on the calendar year basis (R. 35). Its present name was adopted January 1, 1949, theretofore having been General Brewing Corporation (R. 35).

In computing its liability for the so-called excess profits tax imposed by Congress in 1950, petitioner was taxable on the excess of its 1950 income over its "credit". Its credit was based on its average net income for the three best years of its base period (1946-1949, inclusive), unless by reason of its growth during that period petitioner was entitled to compute its credit upon the basis of its best year in the latter half of the base period, i.e., the better of 1948 or 1949. Whether or not petitioner was a growth corporation entitled to compute its credit solely on the basis of its 1949 earnings depends entirely on whether its "gross receipts" for 1948 and 1949 were half again as great as (that is, 150% of) its "gross receipts" for 1946 and 1947. It had the required rate of growth only if the beer excise taxes which it collected and paid to the federal and state governments are not part of its "gross receipts". (R. 43; 36.)

The term "gross receipts" is defined by Section 435(e)(5) in considerable detail. Otherwise, the term

“gross receipts” used in the governing code section is not one customarily used in accounting practice, the terms ordinarily used being “gross sales” and “net sales” (R. 42; 94). Likewise, the term “gross receipts” was not used on the federal income tax returns for the base period to designate gross returns from sale of property in inventory, the terms actually used being “gross sales” and “gross profit from sales” (R. 31, 33).

During the base period, under the provisions of the federal beer excise tax statute, petitioner was required to prepay the federal tax at the rate of \$8.00 a barrel, prior to the occurrence of the taxable act of selling beer. The state tax was payable by returns after sale. (R. 38.) In view of the period of credit indicated by the ratio of taxpayer's receivables to total annual sales, it does not appear whether taxpayer paid the state tax just before or just after receiving its customers' payments (Exhibit I to the Stipulation of Facts.)

In billing its customers petitioner ordinarily did not state the federal and state beer excise taxes separately from the unit price. Invoices covering shipments to Hawaii and other United States territories stated that the federal tax was paid and the shipment was exempt from state tax. Invoices covering shipments to United States possessions (e.g., Samoa) stated that the shipment was tax-free. (R. 37.)

Petitioner regularly published price schedules. Those for California did not state beer excise taxes separately. Those for Nevada stated that the Nevada state excise tax was not included, and after February 1, 1948 they specif-

ically deducted the California beer excise tax. The price schedules for exports showed a deduction of both federal and state taxes in arriving at the price. (R. 37-38.)

Petitioner's published annual reports and its income tax returns for 1946 through 1949 included beer excise taxes collected and paid in the figures shown for gross sales, and deducted them in arriving at net sales by including them without separate identification in cost of goods sold (R. 35-36, 38). The net income reported would not have been changed whether petitioner excluded the beer excise taxes from gross sales (as is customary for many excise taxes), deducted them from gross sales by including them in cost of goods sold, or deducted them as a separate tax deduction.

Petitioner's practice was not followed by a single one of nine other breweries chosen at random from S.E.C. files for comparison, although all of them included beer excise taxes in the amount reported as gross sales. One of the other breweries deducted the beer excises as a separate deduction from gross sales to arrive at gross profit. Seven of them deducted beer excises as a separate deduction, along with cost of goods sold, in arriving at net sales. The ninth one did, like petitioner, include beer excises in cost of goods sold, but dropped a footnote stating that the item included beer excises in a specified amount. (R. 41; 83-84, 87-92.)

There is no uniform practice with regard to the inclusion or exclusion of excise taxes in gross sales as reported for tax and corporate purposes. In some industries, excise taxes are usually included in reported gross sales. In others they are usually excluded. Thus petroleum com-

panies exclude federal and state gasoline taxes from gross sales. Retail stores exclude state and city retail sales taxes from their reported gross sales, as well as luxury taxes such as those on furs. The federal excise tax on phonographs and television sets is also customarily excluded from gross sales. The inclusion or exclusion, as the case may be, does not depend on whether the taxpayer sells to a distributor or directly to the consumer. The effect of exclusion of these taxes from reports of gross sales is to omit them from both income and deductions. (R. 40-41; 80-83; 85-87; 93.) They therefore simply do not appear in the taxpayers' corporate reports or income tax returns.

Prior to a change in the regulations made effective on March 1, 1950, petitioner along with other breweries paid the federal beer excise tax by stamps which had to be purchased in advance and were surrendered when the beer was canned or bottled for sale. After March 1, 1950, the stamps still had to be purchased but were affixed only when the beer was removed from the bonded premises for sale or consumption. There was no change in the statute to account for this change in procedure. (R. 8-39; 29-30.) The state beer excise tax was paid monthly after the sales were made (R. 38; 28).

Beer excise taxes were not imposed as a percentage of sales or gross receipts but were a flat tax per unit of beer. Their rate did not increase during the base period. (R. 46.)

The Tax Court held that petitioner's collections of beer excise taxes were part of its "gross receipts" within the meaning of the statute, and therefore its growth was

not sufficient in terms of its increase in gross receipts to qualify it for the alternative credit allowed to growth corporations (R. 42, 48). Consequently it sustained respondent's determination of a deficiency of \$102,343.94 in petitioner's tax for 1950 (R. 49).

SPECIFICATION OF ERRORS.

1. The Tax Court erred in holding that petitioner's collections of beer excise taxes were part of its "gross receipts" for purposes of I.R.C. Section 434(e), a provision designed to provide a fairer measure of excess profits for taxpayers that had experienced a specified rate of growth of output in the base period.

2. The Tax Court erred in denying petitioner classification as a growth corporation entitled to use the alternative credit for computing its excess profits tax.

STATUTES INVOLVED.

The statutes and regulations involved are printed in Appendix A, *infra*.

SUMMARY OF ARGUMENT.

The issue. The dispute in this case is about the amount of petitioner's excess profits credit. The credit serves as an exemption, so that only so much of petitioner's net income for 1950 as exceeds its credit is subject to excess profits tax. The credit normally allowed was an amount

equal to 85% of the average base period net income, that net income being the average of the net income for the best three of the four years 1946-1949, inclusive. However, in recognition of the fact that some corporations were in the process of permanently increasing their productive capacity during that base period, so that an average which took into account the earlier years before growth was attained would be an unfair measure of excess profits, special formulae were provided for growth corporations. These special formulae used only the income of the last two years of the base period in determining the credit, and the formula petitioner will use if qualified to use any special formula is its net income for 1949. Thus, if petitioner is correct, it will be entitled to earn in 1950 85% of what it earned in 1949 without being taxed on "excess profits". But if petitioner is wrong, its credit will be depressed by having to take into account lower years of earnings earlier in the base period. Petitioner did grow during the base period; the question is whether it grew the required 50% when its growth is measured in terms of its "gross receipts", and this in turn depends on whether the beer excise taxes it collected and paid to the state and federal governments are part of its "gross receipts". If they are not, its gross receipts did grow by the 50% required to qualify. If they are, petitioner's growth is insufficient to qualify and it must pay an "excess profits tax" even though it does not earn as much as it did in a year before that tax was enacted.

I. In the Excess Profits Tax Act the term "gross receipts" is defined at some length so that it will be an index of the growth in physical volume of production of

a taxpayer. The definition generally includes all amounts received from the sale or exchange of taxpayer's stock in trade, property properly includible in taxpayer's inventory and property primarily held by the taxpayer for sale to its customers and, in addition, gross income derived from carrying on its trade or business.

It is the position of petitioner that there is no room in this definition for amounts which merely reimburse it for federal taxes which it has paid and which were levied upon the manufacture and sale or delivery for consumption of its product and some state taxes which were levied upon such sales. The precise terms of the statute would exclude such taxes by failing to include them and a fair interpretation of the statute should require their exclusion from the receipts of the taxpayer, even though those receipts were not segregated on the books of the taxpayer.

II. While it appears to us that the normal intendment of the statutory language supports petitioner's position, only the interpretation petitioner urges will give the statute equal and uniform effect in measuring growth.

For reasons too complex to be briefly summarized but which are developed in the text of the Argument, the interpretation adopted by the Tax Court results in there being varying rates of growth required for different industries, and even for different members of the same industry. Members of an industry subject to an excise tax which is a flat figure per unit must grow more than members of an industry subject to an excise tax which is a percentage of sales price, in order to qualify as a growth corporation under the interpretation adopted below. Moreover, there can even be varying rates of growth required

for members of the same industry, under the Tax Court's view, dependent on the amount of export sales and on the states in which taxable sales are made.

The Tax Court's interpretation also requires that the qualification of a growth corporation be determined on the basis of figures and facts not required to be shown in income tax returns for the periods involved. Many of the excise taxes paid by taxpayers for which they are reimbursed by their customers are not shown or reflected in their income tax returns in any manner or form. Yet the Tax Court held that all excise taxes are part of the "gross receipts" by which growth during the base period should be measured. One would not suppose that Congress meant to require that the amount of the 1950 additional income tax known as the excess profits tax be determined on the basis of figures not found in income tax returns, but, if the decision below is correct, Congress did this improbable act.

The critical term "gross receipts" has no accepted meaning in accounting or business usage, or in income tax experience. It has, however, been used as the measure of many state and local sales taxes, where it has more often than not been interpreted contrary to the interpretation accepted below. *Standard Oil Co. v. State Tax Commissioner*, (1941) 71 N.D. 146, 299 N.W. 447, excluding excise tax reimbursements from "gross receipts", exemplifies the majority view which the Tax Court refused to follow.

Yet the available extrinsic evidence indicates that, contrary to the Tax Court, Congress agrees with the majority view. When the Supreme Court in *Lash's Products Co. v. United States*, (1929) 278 U.S. 175, involving a distinguish-

able statutory phrase, lined up with the minority view, Congress overruled it in Section 615 of the Revenue Act of 1932, a provision continued in the 1939 Code as Section 3441(a) and in the 1954 Code as Section 4216(a). Thus when Congress explicitly focussed on this precise problem, it provided that for tax purposes a taxpayer should not be accountable for collections of commodity excise taxes.

In view of the facts that any other view in the instant case will promote lack of uniform application and administrative complexity and will adopt a test not germane to the purpose of the test, the view Congress adopted in 1932 should be accepted here.

ARGUMENT.

INTRODUCTORY—THE ISSUE.

The tax involved is the excess profits tax imposed as the result of the outbreak of the Korean hostilities, which began about the middle of 1950. The statute involved (Public Law 909, 81st Congress) was entitled "Excess Profits Tax Act of 1950" although its enactment was not completed until January 3, 1951. It was applicable to corporate income for 1950, which is the year before the court.

The Senate Finance Committee stated the justification for the statute in the following words (S.Rep. 2679, 81st Cong., 2d Sess., p. 2; 1951-1 Cum. Bul. 241):

"One of the main advantages of an excess profits tax in periods of large military expansion is that it selects for additional tax those corporations whose profits are higher than they probably would have

been in the absence of hostilities and a large military budget.”

The House Committee on Ways and Means said the same thing in these words:¹

“Your committee conceives of this tax as primarily a tax on increased profits due to the outbreak of hostilities and to large military expenditures.”

Petitioner is seeking to have its excess profits for 1950 determined by comparison with its profits for 1949, the last year in which any increase in profits could not have been attributable to the Korean outbreak. The position of respondent and the Tax Court requires that petitioner's profits for 1950 be compared not with those for 1949 alone, but with those for 1948 and 1947, as well, in which years they were lower. Petitioner's profits showed a continual growth through the base period,² and by 1949 had increased to \$3,862,084.81 (R. 17). In 1950 they were \$4,223,116.33 (R. 13), reflecting an increase from the last year in which they could not have been influenced by the Korean outbreak in the amount of \$361,031.52. Since Congress meant to tax profits which were “higher than they probably would have been in the absence of hostilities and a large military budget,” the declared purpose will be served if the 1950 profits are compared with those of 1949, as petitioner contends.

¹H.Rep. No. 3142, 81st Cong., 2d Sess., p. 3; 1951-1 Cum. Bul. 188.

²They were \$2,013,534.81 in 1946, \$2,077,960.52 in 1947, \$2,345,046.32 in 1948, \$3,862,084.81 in 1949 (R. 17), and \$4,223,116.33 in 1950 (R. 13).

Congress also recognized that 1949 and other years preceding 1950 were exceptionally good years for many corporations, and Congress felt that without the boost to the economy supplied by material demands of the Korean affair profits might have begun to decline by 1950. Therefore, the Excess Profits Tax Act of 1950 provided that in comparing 1950 earnings to earnings of a prior year or years for the purpose of determining what part of the 1950 earnings was "excess profits", i.e., profits attributable to the Korean affair, only 85% of the prior years' earnings could be considered.³

By 1949, petitioner's net income had climbed to \$3,862,084.81 from \$2,013,534.81 in 1946, so petitioner contends its credit should be 85% of the 1949 figure. Respondent, however, contends that petitioner's war profits credit should be determined, not by its earnings in the last single year not affected by the Korean hostilities, but by the last *three* such years. As petitioner's earnings increased each year from 1946 to 1949, inclusive, averaging its 1949 earnings with its earnings for 1948 and 1947 reduces the earnings figure from \$3,862,084.81 to \$2,761,697.22 (R. 17), which in turn is reduced to 85%

³Sec. 435(a), I.R.C. of 1939, as enacted in 1951. It was amended later in 1951 to reduce the percentage to be recognized for future years to 83%. This limitation was explained by its progenitor, the House Ways and Means Committee, as follows (H.Rep. No. 3142, 81st Cong., 2d Sess., p. 2; 1951-1 Cum. Bul. 181) :

"By limiting the credit based upon income to 85 per cent of the base period earnings, the bill will reach some profits which are being sustained at the relatively high levels of the base period by the increased tempo of the defense economy."

The explanation is enlarged upon, substantially as stated in the text, in the same report at page 5, 1951-1 Cum. Bul. at p. 190. See Appendix B, *infra*.

for credit purposes. In terms of figures, this presents the issue raised by the case.

Respondent's effort to reduce petitioner's credit by depriving it of the full benefit of its growth during the base period is based fundamentally on the fact that Congress patterned the Korean excess profits tax after the World War II excess profits tax in ordinarily using an average of several years in a base period as the measure of the credit. Thus under Section 435, the excess profits credit for 1950 is ordinarily 85% of the average base period net income, which is the average of the net income of the taxpayer's three best years in the base period 1946-1949. Respondent's position is thus that petitioner must use the credit designed for the ordinary case.

Congress provided a special rule for growth corporations, which petitioner claims to be. If petitioner is a growth corporation as defined by the statute, then it is entitled to have its excess profits for 1950 determined by comparison with its net income for the single year 1949, which petitioner contends Congress intended. Respondent denies that petitioner is a growth corporation and if respondent is correct, as the Tax Court held, petitioner's credit must be depressed by consideration of the earlier, lower years of earnings.

Although the credit and the earnings on which it is based are both expressed in terms of net income, the tests for qualifying as a growth corporation are not. Petitioner's net income for the last two years of the base period was more than half again as large as for the first two years, the exact ratio being 151.7 to 100. This is not controlling, however, because Congress wrote Sec-

tion 435(e) so as to require that growth be measured in terms of "payroll" (where the required ratio is 130 to 100), or "gross receipts" (where the required ratio is 150 to 100). Thus only if petitioner's payroll for the last half of the base period 1946-1949 is larger than that for the first half in the ratio of 130 to 100, or if petitioner's gross receipts for the last half are larger than those for the first half in the ratio of 150 to 100, does petitioner qualify as a growth corporation. Petitioner does not meet the payroll test of growth. Petitioner contends that it does meet the gross receipts test of growth because its gross receipts for the last half of the base period exceed those for the first half by more than the required ratio of 150 to 100.

Respondent has, however, included petitioner's collections of reimbursement for federal and state beer excise taxes in petitioner's gross receipts and thereby reduced the ratio to 140.69 to 100. The Tax Court has sustained respondent, and the sole issue is whether those tax reimbursements must be included in petitioner's gross receipts.

The term "gross receipts" is not one of heretofore established meaning in income tax law, nor is it one customarily used by accountants in defining or classifying accounts (R. 42; 94). Therefore Congress had to define it, which definition is in Section 435(e)(5) [Appendix A, *infra*].

I. THE DEFINITION IN SECTION 435(e)(5) OF THE INTERNAL REVENUE CODE OF 1939 EXCLUDES BEER EXCISE TAXES FROM "GROSS RECEIPTS".

Section 435(e)(5)(A) defines "gross receipts" for the purpose of this index of growth by a corporation as the "total amount received . . . *from the sale, exchange, or other disposition of stock in trade . . . or other property* of a kind which would properly be included in the inventory of the taxpayer . . . or *property* held by the taxpayer primarily for sale to customers in the ordinary course of trade or business." (Emphasis added.) The language used here does not fairly lend itself to an interpretation against the taxpayer that this definition should include among amounts received for stock in trade, or for property, collections which merely reimburse the taxpayer for excise taxes which had been paid and which were levied upon the sale, or upon the sale and delivery for consumption, of such property.

In other words, that amount of petitioner's collections which merely restored the payments which it had made in paying a tax to the federal government and the various state governments in which the sales occurred did not constitute moneys which it had received for stock in trade or for property.

It is contended by the petitioner that the express itemization of the phrases "stock in trade" and "property" limits the phrase "the total amount received" to those receipts which are referable to the physical property and does not include those collections which merely result from an exaction imposed upon the sale of the product of this

business, a type of exaction imposed in varying amounts on some other businesses and not at all on most businesses.

The petitioner submits that the opinion of the Tax Court begs the question of whether this money was received by the taxpayer for its stock in trade, or for property properly includible in its inventory, or for property held primarily for sale to its customers. Such treatment discards or ignores all of subdivision (A) of Section 435(e)(5) except the phrase "the total amount received." The Tax Court's interpretation of the statute also would eliminate all need for subdivision (B) of Section 435(e)(5), which includes the "gross income" of the taxpayer arising from the conduct of its business in its "gross receipts" (with the exception of certain exclusions therefrom not referable to the physical volume of production). Such a conclusion that part of the statute establishing the index of growth by a corporation is redundant also leaves all four of these last mentioned exclusions without anything from which to be excluded.

The interpretation contended for by respondent enlarges the statutory definition. The respondent's contention also results in an index which is not uniform for taxpayers who have different taxes, for taxpayers who have taxes as against taxpayers who do not have taxes levied upon the sale of their product, and which is ununiform because the taxes are levied in varying amounts depending upon the state in which the sales are made and because there are no such taxes upon export sales.

(A) There Is No Reason or Room in the Statutory Definition of "Gross Receipts" for Excise Tax Reimbursements.

A simple reading of the statute in the case at bar would seem to petitioner to make the answer to the issue involved obvious. "Gross receipts" are defined thereby to include the total amount received from the following items:

(1) The stock in trade of the taxpayer.

(2) Other property of the kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year.

(3) Property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business.

Nowhere therein is included amounts reimbursing the taxpayer for beer excise taxes advanced by the petitioner upon the sale of its product. Where a statute specifically enumerates certain items, it by implication excludes all others from that classification:

Arthur v. Cumming, (1876) 1 Otto (91 U.S.) 362;

United States v. Arredondo, (1832) 6 Pet. (31 U.S.) 689, 691;

Mintz v. Baldwin, (1933) 289 U.S. 346.

Yet despite this obvious statutory itemization, and the above canon of construction, the Tax Court made the following statement:

"Petitioner is in effect asking that we reject a simple and direct application of the term 'total amount received' as including everything received by the corporation in its own right, and employ instead a meaning which will give effect to the statutory purpose. We need not determine whether such an

approach is permissible. Even if it were, it seems to us that the object of the statute as shown by its legislative history will best be served by including all items actually received . . .” (R. 47.)

We are not asking the court to “reject a simple and direct application of the statute” but to read its entire terms and the enumerations contained in it.

We are also requesting the court to give particular heed in its discussion of the legislative history of the statute to the many statements of the Congress such as that appearing in Senate Report No. 2679 (81st Congress, Second Session, p. 27) and House Report No. 3142 (81st Congress, Second Session, p. 24) on the Excess Profits Tax Act of 1950:

“ . . . The use of the alternative gross receipts test is justified by the fact that a corporation *may increase its physical volume of production materially* by introducing additional equipment and new operating procedures which do not involve a corresponding increase in its labor force. The percentages used in the payroll and gross receipts test are sufficiently large so that only those taxpayers will be able to qualify whose businesses have grown substantially more rapidly than the average during the base period years.” (Empasis added; see Appendix B, *infra*.)

From such statements of the legislators it is quite apparent that Congress intended to measure the growth of a taxpayer by the increase in its “physical volume of production” and thus intended to include in “gross receipts” only those beneficial receipts of the taxpayer which reflected sales of its products. We submit that there is nothing in the statutory definition which authorizes or

permits the addition to these amounts of taxes upon some of these sales and in varying amounts upon other of these sales which had to be prepaid and thereafter collected along with the proceeds of the sale.

The refusal of the Tax Court to recognize that the reimbursements for the excise taxes do not measure but distort the increased “physical volume of production” of petitioner disregards the intent of Congress and violates the rule of construction “*expressio unius exclusio alterius.*”

The Tax Court has by implication admitted that beer excise taxes are neither the inventory of the taxpayer nor property held by the taxpayer primarily for sale to its customers, when it directed the issue of the case at bar at the following phrase of Section 435(e)(5) of the 1939 Internal Revenue Code:

“The total amount received or accrued . . . from the sale . . . of stock in trade of the taxpayer.” (R. 44.)

However, the court has included the reimbursements for such taxes in the amount received by the taxpayer for its stock in trade. With this latter conclusion we cannot agree.

The Tax Court in its opinion seems to think that the use of the word “total” in the phrase “total amounts received” enlarges the definition as against the phrase if it had read “the amounts received for.” We submit that the use of the word “total” by Congress meant that the amounts received for the three items stock in trade, property properly includible in inventory, and property held primarily for sale to customers should be

totalled. The word "total" is redundant unless there is more than one amount.

To give the word "total" any other significance would be to say that the "total amount received for beer" was something other than "the amount received for beer."

The petitioner is in the business of brewing and selling beer, not of selling taxes or collecting them for the federal government. Beer is thus its stock in trade, not taxes.

The beer excise tax aspect of the situation arises principally by virtue of Section 3150 of the 1939 Internal Revenue Code. Subsection (a) levies a tax on all the beer "manufactured and sold, or removed for consumption or sale" and subsection (b) requires that "said tax shall be paid by the owner, agent, or superintendent of the brewery." Sections 3153 and 3154 provide for refunds and credits of the beer excise tax for unsalable products, loss, breakage, leakage and transfers in bond. Thus, this tax is not a manufacturer's tax but a sales tax and cannot possibly be classified as petitioner's stock in trade even from this point of view. This argument is here only mentioned because such technical distinctions upon the incidents of liability for the beer tax have no place in determining the purpose and object of the excess profits tax. We are in complete accord with the following statement of the Tax Court in this respect:

"On this approach (the object of the statute) to the meaning of the Excess Profits Tax provision, it is of no consequence whether the beer taxes are manufacturers' taxes or sales taxes." (R. 47.)

However, to hold as the Tax Court did (R. 47) that the reimbursements to petitioner for the tax paid upon

the "manufacture and sale" of its beer "were included in the amount received for its stock in trade" ignores these heretofore mentioned facts, disregards the wording of Section 435(e)(5) of the Internal Revenue Code of 1939 and is contrary to the plain accepted meaning of "stock in trade."

"Stock in trade" has been defined as follows:

"... stock in trade ... is a stock of merchandise as that term is ordinarily used among business men. This term includes the goods or chattels which a merchant holds for sale (*Shasta Lumber Company v. McCoy*, 85 Cal. App. 468 [259 Pac. 965]; *Charles J. Off & Co. v. Morehead*, 255 Ill. 40 [85 N.E. 264, 126 Am. St. Rep. 189, 14 Ann. Cas. 434, 20 L.R.A. (N.S.) 167]; *Swift & Co. v. Tempelos*, 178 N.C. 487 [101 S.E. 8, 7 A.L.R. 1581]). It is 'the visible and tangible property with which the trade or business of the owner is carried on, and to which it relates.' (*New York Biscuit Co. v. Cambridge*, 161 Mass. 326 [37 N.E. 438])."

Story v. Christin (1939), 14 C.2d 592, 595-596, 95 P.2d 925.

"Merchandise or goods kept for sale or traffic." (*Black's Law Dictionary*, 3rd Edition 1933, p. 1662.)

"The goods kept for sale by a shopkeeper." (*Webster's New International Dictionary*, 2nd Edition, 1949, p. 2481.)

Where in any of these definitions is there room for beer excise taxes? Such taxes are certainly not "goods," "chattels" or "merchandise" held by petitioner for sale to its customers. The contrary conclusion that the beer tax is the petitioner's stock in trade would be at complete

variance "as that term is ordinarily used among business men."

Section 435(e)(5) is, of course, defining the term "gross receipts," and the portion of this definition with which we are concerned requires that the amounts includible therein be "*received* from the sale . . . of stock in trade" (emphasis added). Petitioner is at a loss to understand the classification of the beer excise taxes as such "receipts". These reimbursements were paid to the petitioner only after it had advanced the amount of the taxes to the governments involved. In what manner can the petitioner be said to have "received" anything for its stock in trade until the payment of the sales price totals more than it has paid out in taxes? Until this point is reached the petitioner has only been reimbursed for the excise taxes advanced.

Does the bank depositor have any "receipts" when he withdraws his account until he receives interest thereon? Is the repayment of the principal of a loan "receipts" to the creditor? Obviously the answer in each situation is no. The depositor and the creditor are merely being reimbursed for the amount of the funds advanced to the bank and the debtor.

Why, then, should the reimbursement of beer excise taxes paid in advance by the petitioner be classified as "receipts"? Can it be said that the taxpayer who pays an \$8.00 excise tax and who gets only \$8.00 back after delivering a barrel of beer, has done anything more than give the barrel of beer away for nothing? Can it be argued that the taxpayer has received anything for its beer in such an example?

Prior to March 1, 1950, the tax was paid before the sale or delivery (during this Excess Profits Tax Act's base period), and Section 3154 of the 1939 Internal Revenue Code permitted the Commissioner to refund to a brewer taxes paid on beer which had become unsalable on the brewer's premises. In this event, when the taxpayer had been refunded the \$8.00 per barrel which it had paid and the beer had been destroyed as required by Section 3154, could it be said that the taxpayer had "received" \$8.00 a barrel from the destruction of its beer? Surely not, we submit.

Consequently, the Tax Court's holding that reimbursements for beer excise taxes are part of the "gross receipts" of the petitioner ignores the statutory definition of that term, disregards the express itemization of the items includible therein, negates the intent of Congress that the term should measure the growth in "physical volume of production" and overlooks the fact that the sums includible therein must be "receipts" of the taxpayer.

(B) The Tax Court's Interpretation Renders A Large Portion of the Excess Profits Tax Definition of Gross Receipts Meaningless Surplusage.

The Tax Court made a still further unjustified construction of Section 435(e)(5)(A) when it made the following statement:

"Petitioner is in effect asking that we reject a simple and direct application of the term 'total amount received' *as including everything received by the corporation* in its own right, and employ instead a meaning which will give effect to the statutory purpose." (R. 47; Emphasis added.)

This petitioner had argued in the Tax Court that the portion of its sales price which merely reimbursed it for taxes which it had to pay upon the sale of each unit of its product was not "amounts received" from "the sale . . . of stock in trade of the taxpayer. . . ." The above quotation from the Tax Court's opinion in effect attempts to answer this contention by saying that Congress said total amounts received and that the use of this phrase makes unnecessary an examination of what the amounts were received for.

That Congress was concerned that a taxpayer's growth be measured in reference to its physical volume of production is echoed in its choice of the phrases "stock in trade," "property properly includible in inventory," and "property held primarily for sale to its customers." For the Tax Court to say that the use of the phrase "total amount received" concludes any inquiry into whether a receipt should be attributable to the sale of a tangible unit of taxpayer's production is in effect to say that Congress meant to substitute for subsection (A) of Section 435(e)(5) a statute which would define gross receipts as "the total amounts received by the taxpayer."

The Tax Court's holding that the term "total amount received" includes "everything received by the corporation" makes it rather hard, if not impossible, to determine what Congress had in mind in subsection (B) of Section 435(e)(5), where it said that in addition to the amounts received by the taxpayer for its stock in trade "gross receipts" should include gross income attributable to a trade or business regularly carried on by the taxpayer and specifying certain exclusions from the latter.

The Tax Court's misconstruction of subsection (A) also fails to recognize that the itemized exclusions from subsection (B) were placed in the statute for a purpose. Should subsection (A) include "everything received by the corporation," as the Tax Court would have us believe, there would not only be no amounts includible in "gross receipts" under subsection (B) but there would be nothing upon which these exclusions might work.

The Tax Court reached its conclusion despite the well recognized maxim of statutory construction that no part of a statute can be presumed to be superfluous or redundant when any other interpretation is possible. The Supreme Court of the United States clearly expressed this canon of construction in the following words:

"Congress is not to be presumed to have used words for no purpose . . . the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word of a statute." (*Platt v. Union and Pacific Railroad Company*, (1879) 9 Otto (99 U.S.) 48, 58.)

The petitioner's interpretation of Section 435(e)(5)(A) not only gives effect and meaning to every word of that subdivision, but also to the entire context of subdivision (B). The Tax Court's construction does not. Thus, we respectfully submit that because the Tax Court's construction makes redundant the language indicative of taxpayer's "physical volume of production" as well as Section 435(e)(5)(B) it cannot be sustained.

(C) The Tax Court Has Ignored the Legislative Intention That the Growth Formula Measure the Increase in Taxpayer's Physical Volume of Production.

The growth formula of the Excess Profits Tax Act of 1950 is one intended to measure the increase in the physical volume of production of the taxpayer; it is not a measure to be haphazardly applied upon varying taxpayers merely because somebody elected to impose, reduce, increase or repeal an excise tax, or a test dependent upon the varying effect of the varying state statutes imposing such taxes.

That Congress intended it to have such a constant and uniform effect is demonstrated by the statutory mandate that amounts be received from the sale of physical items of production (Section 435(e)(5)(A)) and by the Senate and House Committee reports justifying the growth formula because "a corporation may increase its physical volume of production materially" (*supra* p. 18). To include beer excise taxes reimbursed the petitioner upon the sale or distribution of its beer for consumption in "gross receipts" is to ignore this Congressional intent.

The Tax Court has made the following unwarranted assumption in its reference to the admitted test of the taxpayer's increase in physical volume of production:

"By that test items which remain stable in their relationship to units produced, such as taxes in the present case, do not throw the formula off nor make its working inequitable." (R. 47.)

Such a statement is a circumlocution which denies without disproving or even examining something which cannot be disputed. If the inclusion of the taxes in petitioner's

“gross receipts” accurately measured its physical volume of production, there would be no lawsuit here. The result would be the same whether they were included or excluded. The very fact that the result is not the same should end all discussion of the question whether or not the inclusion of such taxes properly measures a taxpayer’s physical volume of production.

The sales invoices and pricing schedules of petitioner (Exhibits III and IV to Stipulation of Facts; not printed pursuant to stipulation of parties) demonstrate that its sales prices were dependent upon and determined by the taxes applicable in the particular sales area. To include reimbursements for these taxes in petitioner’s “gross receipts” is to measure its growth by amounts which the petitioner is forced to advance by federal and varying state statutes, by sums which do not measure its physical volume of production, and by taxes which the consumer pays upon the purchase of petitioner’s product.

II. WHEN THE TAX STATUTE IS CONSTRUED IN THE LIGHT OF ITS PURPOSE AND INTENDED EFFECT, THE TAX COURT’S CONSTRUCTION OF IT CAN BE SEEN TO BE ERRONEOUS.

If the language of the statute leaves any doubt that petitioner is entitled to be classified as a growth corporation, we believe that consideration of the problem in the light of the purpose and intended effect of the statute will remove any such doubt.

As we have seen, the tax involved was designed to reach “increased profits due to the outbreak of hostilities

and to large military expenditures,"⁴ and the decision below results in this war profits tax reaching about \$1,000,000 of profits attributable to petitioner's growth attained before 1950 and not to war conditions at all. Why should it be supposed Congress intended this result?

Petitioner maintains that any approach to the problem will demonstrate that Congress could not have intended to deny petitioner the benefit of its growth. In selecting "gross receipts" as the measure of petitioner's growth, Congress did not intend to include reimbursements of beer excise taxes in those gross receipts.

1. The gross receipts test of growth was designed to grant relief to a corporation which had grown "substantially more rapidly than the average" in "its physical volume of production."⁵ Obviously a taxpayer which had not made any change in its product in the base period could conveniently measure its volume of production in units of that production, such as gallons of beer, but a taxpayer which had made changes in its product, such as from passenger automobiles to industrial trucks, or from typewriters to electronic tabulating machines, could

⁴H.Rep. No. 3142, 81st Cong., 2d Sess., p. 3; 1951-1 Cum. Bul. 188; Appendix B, *infra*.

⁵S.Rep. No. 2679 and H.Rep. 3142, 81st Cong., 2d Sess., 1951-1 Cum. Bul. at 203 and 258. See Appendix B, *infra*, for the entire relevant text. The complete quotation is:

"The use of the alternative gross receipts test is justified by the fact that a corporation may increase its physical volume of production materially by introducing additional equipment and new operating procedures which do not involve a corresponding increase in its labor force. The percentages used in the payroll and gross receipts tests are sufficiently large so that only those taxpayers will be able to qualify for the alternative credit whose business has grown substantially more rapidly than the average during the base period years."

not. Undoubtedly the use of "gross receipts" as a measure was because Congress sought one of universal application, without variables due to differences between industries and locations, or within single industries.

The Tax Court has said that its interpretation is consistent with Congress' evident purpose to use a constant measure, not varying between industries (R. 44-47). It has evidently conceived that because the taxes herein were stable in terms of units produced instead of variable according to selling price, its interpretation attains the desired uniformity between industries (R. 47). Yet we can quite readily demonstrate that that interpretation has quite the opposite effect. If the rate is constant, the fact is that only in cases of a flat unit tax is there any variation whether the tax is included in receipts or not. The interpretation adopted below can result in a member of one industry qualifying for relief and a member of another industry failing to do so, simply because of differences in the type of excise taxes to which they were subject.

Both federal and state beer excise taxes were unchanged in rate during the base period, and were in terms of units of production, not percentages of selling price (R. 46). The federal tax was \$8.00 a gallon, and the California state tax 62 cents a gallon.⁶ Thus, if a brewery raised its prices, the tax would not increase. As the brewery's prices increased, the ratio of fixed tax to increasing price would decrease. But if an industry subject to a different type of excise tax, one which was

⁶Petitioner paid no out-of-state beer taxes which, to the extent applicable, were paid by its distributors.

a fixed percentage of the price, should increase its price, the tax would increase with the price and hence the ratio of tax to price would remain constant. If the excise tax is part of the measure of growth, the effect of this is to require the first industry to grow more than the second one in order to be judged the same by this particular measure.

The base period was notoriously a period of price increases. The official United States Consumer Price Index⁷ shows the following price increases in consumer goods expressed in terms of an index of 100:

		Price Level
January 1946	-	77.8
January 1947	-	91.9
January 1948	-	101.3
January 1949	-	102.7
December 1949	-	101.0

This index increase of 23.2 points from January, 1946, to December, 1949, represents a percentage increase in price level of 30%. Compared to this overall price increase is petitioner's increase in base price of 21.6 per cent during the same period (R. 40), which establishes that petitioner's increase in gross sales and in net income was not attributable to excessive price increases. In fact, petitioner's price increases were below the average.

The significance of the effect of price increases is that Congress was thoroughly aware that prices generally had increased during the base period, and for this reason

⁷U.S. Department of Labor, Bureau of Statistics, Series A-1 (all items).

required the exceptionally high standard of growth of 150 to 100, when measured by gross receipts. In contrast, the standard of qualifying growth when measured by payroll was fixed at only 130 to 100.⁸ By way of additional contrast, the World War II excess profits tax, which provided for elimination of abnormal deductions or income, defined such abnormalities as those which exceeded the average of the four prior years by the ratio of 125 to 100.⁹ This ratio was adopted as a substitute for a "grossly disproportionate" test, which was considered to lack certainty.¹⁰ In framing the Korean excess profits tax, Congress reduced the ratio for qualifying abnormalities from 125 to 100 to 115 to 100 in the case of abnormal deductions¹¹ and to 110 to 100 in the case of abnormalities in income¹² Also, in providing relief for corporations which had made substantial changes in products or services dur-

⁸The average weekly earnings of production workers and non-supervisory employees (which would comprise most of the payroll of manufacturers) increased 20.4 per cent in the same period, from \$43.74 a week to \$54.92 in 1949 (Handbook of Labor Statistics, U.S. Department of Labor, Bureau of Statistics, Bulletin No. 916 (1947 Ed.); Hours and Earnings, Annual Supplement, Industry Report, U.S. Department of Labor, Bureau of Labor Statistics (April, 1953) p. 25).

Thus during the base period labor costs increased 20%, petitioner's prices increased 21.6%, and average consumer prices of all goods increased 30%. The comparison between the 20% increase in labor costs and the 30% increase in overall price levels is similar to the comparison between the 130 to 100 payroll increase and the 150 to 100 gross receipts increase required for qualification as a growth corporation.

⁹Sec. 711(b)(1)(G), (H) and (I), I.R.C. of 1939, as in effect from 1941 to 1945, inc.

¹⁰H.Rep. No. 146, 77th Cong., 1st Sess., p. 5; 1941-1 Cum. Bul. 552.

¹¹Sec. 433(b)(9).

¹²Sec. 442(d).

ing the base period, Congress retained the 125 to 100 ratio of the World War II law.¹³

But when it came to providing relief for growth corporations in the 1950 statute, Congress provided higher ratios than before as conditions for qualification. In an effort to provide appropriate tests for eliminating corporations the growth of which was not "substantially in excess of the growth of industry in general,"¹⁴ Congress provided, not the 125 to 100 test of World War II and of Section 443(a), but the higher ratio of 150 to 100 in the case of the gross receipts measure. Obviously, as we observed before, Congress knew what everyone else knew, that both wages and prices had risen during the base period. Undoubtedly these higher ratios were designed to compensate for that fact. Congress undoubtedly knew that prices had risen more rapidly than wages¹⁵ and for that reason required a greater increase in gross receipts than in wages¹⁶ to demonstrate growth "substantially in excess of" average.¹⁷

Since Congress evidently drafted this legislation so as to operate properly in the light of the fact of wage and price increases during the base period, it is inconceivable that Congress would have deliberately used a definition of

¹³Sec. 443(a) (3).

¹⁴H.Rep. No. 3142, 81st Cong., 2d Sess.; 1951-1 Cum. Bul. 203 (Appendix B, *infra*).

¹⁵See footnote 8, *supra*, for the actual percentages of increase.

¹⁶150 to 100 in gross receipts, 130 to 100 in wages, a difference of 20%.

¹⁷Petitioner's prices increased 21.6% during the base period (R. 40).

“gross receipts”, the key to one of the standards of qualification, which would operate differently, given the fact of price increases, dependent on the type of excise tax various taxpayers had to pay. It is an established rule that statutes are to be construed to operate uniformly if possible (*Knowlton v. Moore*, (1900) 178 U. S. 41, *R.F.C. v. Beaver County*, (1946) 328 U.S. 204) and uniformity between income taxpayers will not be achieved by requiring more growth of taxpayers subject to an excise tax expressed in terms of a fixed tax per unit of volume, in order to qualify for relief, than of taxpayers subject to an excise tax expressed as a percentage of selling price.

Yet if excise taxes on beer paid by petitioner to the federal and state governments and thereafter recovered from its customers or from the government are includible in petitioner’s “gross receipts”, this discrimination against petitioner and others in its class will result, producing an unintended lack of uniformity in the operation of the statute.

2. If reimbursements of consumer’s taxes, of which beer excise taxes are an example, are included in gross receipts, the measure of growth Congress used will discriminate between industries, and between taxpayers in differing geographical locations, because of differing results dependent on whether excise taxes were imposed on them or were increased during the base period. This result Congress could not have intended, for it is contrary to the established purpose to obtain uniform application of federal statutes. *R.F.C. v. Beaver County*, (1946) 328 U.S. 204.

Some industries are not subject to federal excise taxes, whereas others are. Some are subject to state excise taxes in some states but not in others. Some taxpayers within taxed industries sell largely in export and thus escape federal and state excise taxes to that extent, whereas others have comparatively few export sales and hence collect and pay over more excise taxes per unit of production than other members of the same industry. Some excise taxes, notably state and local, were increased during the base period, whereas others were not.¹⁸

A few simple tables will demonstrate the effect these differences can have, if excise tax collections are included in gross receipts. In each of these tables it is assumed that 100 units are originally sold at \$15.00 a unit without tax and that the tax when imposed is \$8.50 upon each unit.

I

Table I postulates increases in price, and compares a corporation subject to a fixed excise tax per unit with a corporation not subject to any excise tax. It shows that as the price increases the number of units the corporation subject to the tax must sell increases, in relation to the untaxed corporation, in order to obtain an increase in gross receipts to 150%, if the excise taxes are included in

¹⁸The beer excise taxes to which petitioner was subject were not increased during the base period (R. 46). However, as its growth increased so did its sales in other states, on which it paid no state excise taxes. In actuality, then, its ratio of excise tax collections to sales declined during the base period, thus slowing its growth as measured by the Tax Court.

gross receipts. This bears on the prior discussion as well as that herein.

Increase In Price	Number of Units that must be sold to Equal 150% Increase in Gross Receipts	
	No tax	Tax
0%	150	150
10%	136	141
20%	125	133
30%	115	126
40%	107	119
50%	100	114

II

Table II shows that, conversely, when the price decreases the corporation subject to the fixed excise must grow less than the untaxed corporation, in order to have a growth to 150% when measured in terms of gross receipts which include excise tax collections.

Decrease In Price	Number of Units that must be sold to Equal 150% Increase in Gross Receipts	
	No tax	Tax
0%	150	150
10%	167	160
20%	187½	172
30%	214	185
40%	250	200
50%	300	220

III

Table III compares the case of a taxpayer never subject to excise tax with a taxpayer originally subject to such tax but where the tax is eliminated at the end of the first two years of the base period, first assuming no increase in price in the second half of the base period and then assuming various percentages of increase in price up to 50%. It will be noted what a tremendous discrimination

exists in favor of the taxpayer never subject to tax with respect to the number of additional units which must be sold in order to produce an increase of 150% in gross receipts. Thus, where there is no increase in price, the untaxed taxpayer must sell only 150 units to qualify, whereas the taxpayer originally taxed must sell 235 units. At the other extreme of a 50% increase in price, the untaxed taxpayer must sell only the same number of units, i.e., 100, in the second half as in the first in order to increase its gross receipts by 150%, whereas the taxpayer originally subject to tax must sell 156 units.

Increase In Price	Number of Units that must be sold to Equal 150% Increase in Gross Receipts	
	Never any tax	Originally tax, but Eliminated
0%	150	235
10%	136	214
20%	125	196
30%	115	181
40%	107	168
50%	100	156

IV

Table IV deals with the converse situation, in which the first taxpayer is never subject to excise tax and the second taxpayer was not subject to tax in the first half of the base period but the tax is imposed at the beginning of the second half. Here it will be noted that, with no increase in price, the second taxpayer need sell only 96 units to increase its gross receipts by 150%, whereas the first taxpayer must sell 150 units. At the other extreme, with a 50% increase in prices assumed, the first (untaxed) taxpayer need sell only 100 units, but the second taxpayer will qualify by selling a mere 72½ units as against the 100 units it sold in the first half of the base period.

Increase In Price	Number of Units that must be sold to Equal 150% Increase in Gross Receipts	
	Never any tax	No tax to begin with, but added later
0%	150	96
10%	136	90
20%	125	85
30%	115	80½
40%	107	76
50%	100	72½

Table IV does not assume a hypothetical situation. In California, the state excise tax on distributors of gasoline was increased from 3 cents to 4½ cents a gallon effective July 1, 1947. That increase is exactly 50%. Moreover, in California, cities began to impose retail sales taxes for the first time during the base period. San Francisco's tax first became effective on October 1, 1947. The effective dates of those taxes for other major cities were: Beverly Hills, November 1, 1948; Berkeley, October 1, 1946; Burbank, April 1, 1948; Chico, January 1, 1949; Los Angeles, May 11, 1946; Napa, July 1, 1948; Oakland, October 1, 1946; Pasadena, April 1, 1948; Riverside, July 3, 1948; San Diego, July 1, 1946; San Jose, April 1, 1948; Santa Barbara, July 1, 1947; Santa Cruz, January 1, 1949; Stockton, April 1, 1948; Vallejo, September 2, 1947. These city taxes range from ½ of 1% to 1%, and are carbon copies of the state tax. Obviously, to include them or the gasoline tax in gross receipts would be enough to qualify some taxpayers for relief, merely because of the accident of tax increases.

V

Table V illustrates the geographical disparity in application of the statute produced by the Tax Court's posi-

tion. The beer excise tax in California is 62¢ per barrel, whereas in a number of other states it is more, the highest being the \$13.23 per barrel tax in Mississippi.¹⁹ If, as the Tax Court held, beer excise tax reimbursements are includible in gross receipts, the Mississippi brewer must grow more than the California brewer in order to qualify for relief, as shown in the following table.

Increase In Price	Number of Units that must be sold to Equal 150% Increase in Gross Receipts	
	California brewer (Fed. & Cal. Tax)	Mississippi brewer (Fed. & Miss. Tax)
0%	150	150
10%	141	144
20%	133	138
30%	126	133
40%	119	129
50%	114	124

The lack of geographical uniformity shown by Tables IV and V is not the only disparity the construction below produces. Let us return to Table IV and the schedule of city sales tax adoptions, considered above (p. 37). Petitioner is not a retailer and hence was not subject to these increased sales taxes, but retail vendors of its product were. Can it be supposed that Congress meant to define "gross receipts" so that a retailer of beer would qualify as a growth corporation and a manufacturer of beer with the same percentage of increase in unit sales would not, simply because of the fact that one acted as collector of the sales tax and the other did not? Yet the construction below, which would include in gross receipts sales taxes adopted in the latter half of the base period,

¹⁹Calif. Rev. & Tax. Code, Sec. 32151(a); Miss. Code Ann., Sec. 10242.

would have this effect. We submit that Congress intended no such senseless and purposeless discrimination.

Nor could Congress have intended to qualify gasoline distributors for relief but not brewers, merely because of the fact that state excise taxes on gasoline increased by 50% in the base period, whereas brewers' excise taxes were unchanged.

Yet discriminations of this sort, which Congress patently could not have intended, are implicit in the decision below. Only if consumer taxes imposed in the form of commodity excise taxes collected by the seller are excluded from the seller's "gross receipts", will the measure of growth have the uniform application geographically and between industries which Congress must have intended.

The Tax Court expressed doubt of its right to "give effect to the statutory purpose" in view of what it considered was the "simple and direct application" of the statutory language (R. 47). We believe we have demonstrated in the prior division of this brief that the "simple and direct application" of the language is the direct opposite of what the Tax Court held. But if it were not, the courts are required to construe a statute so as to attain its purpose (*Inland Waterways Corp. v. Young*, (1940) 309 U.S. 517; *Helvering v. Clifford*, (1940) 309 U.S. 311; *Helvering v. Stuart*, (1942) 317 U.S. 154; *United States v. Universal C.I.T. Corp.*, (1953) 344 U.S. 218). This is so even though a literal reading of the statutory language would suggest a contrary result, for it is well settled that the statutory purpose is to be attained even at the expense of literalness where literalness would lead

to absurd, unjust or other obviously unintended consequences (*Lionberger v. Rouse*, (1870) 9 Wall. (76 U.S.) 468; *United States v. Ryan*, (1931) 284 U.S. 167; *Sorrells v. United States*, (1933) 287 U.S. 435). Accordingly, even if, which we do not concede, the literal meaning of the statute supported the decision below, the unequal and absurd consequences of that application, defeating the purpose of the statute, would compel reversal.

3. The critical statutory phrase, "gross receipts", is not in general use in accounting or in income tax law.²⁰ The term commonly used in accounting usage and which appears in the income tax returns is "gross sales".²¹ There is no single generally accepted practice governing the inclusion or exclusion of excise taxes in or from "gross sales".²² Thus retail sales taxes are generally excluded from reports of gross sales in corporate reports and income tax returns. The same is true of gasoline excise taxes, and of federal taxes on phonographs, television sets and furs.²³ Their exclusion from "gross sales" means that one will study an income tax return in vain if he seeks to know how many dollars of such a tax a given taxpayer collected and paid over to the governments. Yet these taxes are collected by sellers, do pass through their hands and into their treasuries, and are reflected somewhere in their books of account, before being paid over to the imposing government.

²⁰R. 42, 94. It is not to be found in the Dictionary of Income Tax Terms (CCH, Inc., 1955).

²¹R. 42, 31, 33.

²²R. 40-41.

²³R. 40-41.

Beer excise taxes are handled accounting-wise in a variety of ways, but are customarily included in reported gross sales.²⁴ Some breweries place them in a special category to differentiate them from true costs of the goods sold,²⁵ although petitioner did not.²⁶

What this means in the administration of the excess profits tax on the theory adopted below is a real increase in the problems of audit and administration. The income tax return forms in use in the base period, in which the information necessary for determining qualification must have been supposed to have been present, simply would not contain that information, on the interpretation adopted below. Thus, the form called for the following information about gross receipts from sales:²⁷

1. Gross sales (where inventories are an income-determining factor)	\$;	Less: Returns and allowances . . \$	\$
2. Less: Cost of goods sold . (From Schedule A)
3. Gross profit from sales			\$
4. Gross receipts (where inventories are not an income-determining factor)		\$	
5. Less: Cost of operations. (From Schedule B)	
6. Gross profit where inventories are not an income-determining factor"

It will be seen that line 1 of the income tax return form denominated the amount received from the sale of inventory goods as "gross sales", line 2 called for "cost

²⁴R. 41; 83-84, 87-92.

²⁵R. 83.

²⁶R. 36.

²⁷Exh. I to Stipulation of Facts, R. 31-33.

of goods sold" which was deducted from "gross sales", and line 3 called for the resulting balance, denominated "gross profit from sales". The record herein, including the findings below, shows that in many industries and businesses a corporation's collections of excise taxes will be omitted entirely from the "gross sales" figure,²⁸ and this means of course that it will not appear any place on the return. If, as the Tax Court held, excise taxes collected by a corporation at the time of sale are part of that corporation's "gross receipts", then the income tax returns of nearly every retailer corporation in the United States are inadequate to provide the information necessary for the determination of their excess profits credits. This is obviously a large class of taxpayers. To it must be added the corporations which pay gasoline excise taxes and collect them from the consumers, since the record shows²⁹ that they too customarily omit those tax collections from the figure shown as representing "gross sales".

A decision that excise tax collections are not part of "gross receipts" gives less administrative difficulty. Corporations which include those collections in the figures shown for gross sales deduct them out either as a part of cost of goods sold,³⁰ as a separate deduction before arriving at gross profit or net sales (synonymous terms) or as a so-called "below-the-line deduction",³¹ which means a deduction which is grouped with business expenses, salaries, interest and other general deductions. In any of these circumstances, the amount of the excise

²⁸R. 40-41.

²⁹R. 40.

³⁰As petitioner did (R. 36).

³¹R. 82.

tax collection will be set forth in schedules attached to the return so that where it has been included in gross sales it can be found, isolated and removed.

It is an accepted canon of construction that an interpretation which avoids administrative complications is to be preferred to one which creates them.³² As petitioner's interpretation does not require the tax law to be administered on the basis of figures not shown on the base period returns by a large class of taxpayers, petitioner's interpretation should be adopted.

4. Since the term "gross receipts" is a new phrase in income tax law, and since "gross sales", the term in use in income tax and accounting usage closest to it in meaning, has not a single settled usage or connotation concerning the omission or inclusion of excise taxes, the Congress did not employ a term of known, precise meaning, or a term which had acquired a precise artificial meaning in accounting or income tax usage. Perhaps Congress was well aware of this and for this reason sought to give precision to the term by defining it in Section 435 (e)(5). While we contend that the language of the definition is dispositive in our favor, our argument is now discussing the case on the premise that terms of the definition leave the matter in doubt.

A similar problem of statutory interpretation has been presented under laws taxing "gross receipts" from certain occupations and businesses, or from sales of selected commodities. Where the statute did not dispose of the

³²*NLRB v. Greensboro Coca Cola B. Co.*, (CA 4, 1950) 180 F. 2d 840, 845; *Haggar Co. v. Helvering*, (1940) 308 U.S. 337, 394; cf. *Universal Camera Corporation v. NLRB*, (1951) 340 U.S. 474, 489; *Knowlton v. Moore*, (1890) 178 U.S. 41.

problem by express provision, some courts have held that the "gross receipts" on which the tax was levied, or by which it was measured, did not include other excise taxes on the commodity. Thus, in *Standard Oil Company v. State Tax Commissioner*, (1941) 71 N.D. 146, 299 N.W. 447, where an excise tax on "gross receipts" from the sale of gasoline was involved, the federal gasoline excise tax imposed on the gasoline distributor and collected by him from the consumer was held not to be part of the seller's "gross receipts" since he was in actuality though not in form merely a collection agent for the federal tax. "Gross receipts" was defined by the statute as the total amount of sales by retailers, and hence sales price was held not to include excise tax reimbursements. And in *Socony Vacuum Oil Co. v. City of New York*, (1936) 247 App. Div. 163, 287 N.Y.S. 288, a city excise tax on "receipts" from sales at retail was involved. The state excise tax on gasoline imposed on the retailer and passed on by him to his customers was held not to be part of the retailer's taxable "receipts".

A case involving a definition closely similar to the one herein, and reaching the result for which we contend here, is *Standard Oil Company v. State*, (1937) 283 Mich. 85, 276 N.W. 908. That case involved a state sales tax on "gross proceeds" of sales. The term involved was thus not identical to the one herein but was similar. However, the term was defined in a way which is indistinguishable from the definition herein so far as the present problem is concerned. "Gross proceeds" was defined as "the amount received in money, credits, property or other money's worth in consideration of sales at retail . . ., with-

out deduction on account of cost of material, labor, or purchases, or amounts paid for interest or discount or any other expenses whatever.”³³ The question presented was whether the federal gasoline tax of one cent a gallon “imposed on gasoline sold by the producer” was includible in the producer’s “gross proceeds”. The Michigan Supreme Court held that the collections of federal gasoline tax should not be included in the taxpayer’s “gross proceeds” as defined.

Similar statutory language was similarly construed by the Alabama Supreme Court in *Ross Jewelers, Inc. v. State*, (1953) 260 Ala. 682, 72 So. 2d 402, where an earlier case from the same court (*Pure Oil Co. v. State*, (1943) 244 Ala. 258, 12 So. 2d 861) which had reached an apparently inconsistent conclusion was distinguished on the ground that it had involved a privilege tax measured by gross receipts. The definition of “gross proceeds” for sales tax purposes, which closely resembled the Michigan definition discussed in the preceding paragraph, was held not to include the federal excise tax on watches.

Finally, the Louisiana Supreme Court held that federal and state excise taxes on liquor should not be included in the taxable value of liquor stocks for state property tax purposes. The taxpayer was a retailer who had purchased liquor stocks from distillers, paying a price which included an element of reimbursement for the liquor excise taxes paid by the distiller. The statute provided that the retailer’s taxable cost should be:

³³For comparison, the language of the statute herein defines gross receipts to be “the total amount received or accrued . . . from the sale, exchange or other disposition of stock in trade of the taxpayer . . .”

“ . . . arrived at by computing the cost or purchase price of said shipment at the point of origin, plus the carrying charges to the point of destination . . . ”

Thus, unlike the statute herein, the Louisiana statute appeared literally to call for inclusion of the amount representing excise tax reimbursement in the defined subject. Nevertheless, in *F. Strauss & Son, Inc. v. Coverdale*, (1944) 205 La. 903, 18 So. 2d 496, the court held that the taxable cost to the retailer did not include the liquor excise tax reimbursement paid to the distiller. The court concluded that excise taxes were essentially consumers' taxes; hence the distiller and the retailer were both merely instruments of governmental policy in collecting the tax from the real taxpayer, the consumer. The court was influenced in arriving at its conclusion that the taxes were consumers' taxes by the fact that a floor stocks tax is imposed by Congress whenever the rates are increased, in order that liquor which was in the pipeline from distiller to consumer when the increase became effective would nevertheless bear the increased tax when the consumer bought it.

The circumstances which impressed the Supreme Courts of Louisiana, Michigan, North Dakota, Alabama and New York are present here. The beer excise taxes are consumers' taxes. This is so not only because sales and commodity taxes are generically consumers' taxes from the economic point of view,³⁴ but for more particularized

³⁴“ . . . any tax on sales or output tends to shift directly to the consumers of the products and is borne primarily in relation to consumer expenditures.” Due, *Government Finance, An Economic Analysis* (Irwin, 1954) p. 291.

reasons. When the federal beer excise tax involved herein was imposed on brewers in the 1939 Internal Revenue Code, a floor stocks tax was also imposed taxing beer held for sale by a retailer (Sec. 3191).³⁵

The state beer excise tax is that classic type of consumers' tax, a sales tax. It is imposed on "all beer . . . sold in this State by a manufacturer."³⁶ Beer consumed by employees,³⁷ beer spoiled, destroyed, exported or sold to another manufacturer³⁸ is exempt.

Accordingly, the reasoning of these state cases is applicable to this case.³⁹

When Congress was faced with the problem considered by these cases, it reacted just as these state courts did. The circumstances were these. The Revenue Act of 1918 imposed an excise tax on "soft drinks sold by the manufacturer . . . equivalent to ten per cent of the price for which so sold." The question arose whether the tax reimbursement the manufacturer received as part of the selling price was part of that selling price which was meant to be taxed. The Supreme Court held that it was.

³⁵Similarly, the federal manufacturers' excises had a floor stocks tax (Sec. 3400(b), 1939 I.R.C.) to reach goods which had already been sold by the manufacturer but had not yet reached the consumer.

³⁶Sec. 23, California Alcoholic Beverage Control Act as in effect in base period.

³⁷*Ibid.*, Sec. 23a.

³⁸*Ibid.*, Sec. 23b.

³⁹There are a smaller number of state cases to the contrary. *Pure Oil Co. v. State*, *supra*; *State Tax Commission v. Quebedeaux Chevrolet*, (1951) 71 Ariz. 280, 226 P. 2d 549; *Consol. Distributors v. Atlanta*, (1942) 193 Ga. 853, 20 S.E. 2d 421. The latest case on the subject refused to follow them and confined the earlier Alabama case (*Pure Oil Co. v. State*, *supra*) to its facts. *Ross Jewelers Inc. v. State*, (1954) 260 Ala. 682, 72 So. 2d 402.

Lash's Products Co. v. United States, (1929) 278 U.S. 175.⁴⁰ Congress soon overruled the court prospectively by enacting what was, during the period involved herein, Section 3441(a) of the 1939 Code.⁴¹ This section provides that for the purposes of those federal excise taxes which are a percentage of the sales price "there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge."⁴² It should be noted that Congress took this action although the Supreme Court's interpretation in the *Lash Products* case did not, in the setting there presented, involve the serious discrimination and lack of uniformity of application between taxpayers which are the inevitable result of the Tax Court's decision in the instant case.

Accordingly, we know that when specifically faced with the problem, Congress agreed with those courts which have construed "gross receipts" and "gross proceeds" as not including reimbursements received for excise taxes passed on to the consumers.⁴³ This is, we believe, the most relevant indication of what Congress' disposition is concerning the problem presented here. Since it points in

⁴⁰As "price for which sold" is a broader term than that herein involved, the *Lash Products* case is not in point except as an historic fact.

⁴¹Originally enacted as Sec. 615 of the Revenue Act of 1932, and now in Sec. 4216(a), 1954 Internal Revenue Code.

⁴²As beer excise taxes are a fixed amount per unit of volume, not measured by price sold, they are not governed by this section.

⁴³If petitioner failed to pass these taxes on it would soon be insolvent. These taxes total about one-third of what the distributors of petitioner's beer pay to it. (R. 35-36.) The figures in the record show that out of each \$3.00 received from its distributors, petitioner paid beer excise taxes of \$1.00 and retained a profit for itself of 44¢. Obviously it could not absorb such a large tax in so much smaller a profit and survive.

the same direction as the considerations previously argued, it should be given effect.

5. If, as the Tax Court held, Congress did not mean to measure a taxpayer's growth by the receipts it received beneficially, from which it could expand and grow and by which it could buy materials to stay in business, then where did Congress intend to draw the line? Can it conceivably be, as the Tax Court said (R. 47), that all amounts physically received by a taxpayer from the sale of its stock in trade were intended to be included in its gross receipts?

The Tax Court's analysis seems to mean that collections by a taxpayer of the California use tax are to be included in the seller's gross receipts. This tax⁴⁴ is levied on the consumer, and the seller is not the consumer of the product which it sells. The tax operates exclusively on merchandise purchased from sellers that California cannot tax for constitutional reasons. Cf. *Chicago Bridge & Iron Co. v. Johnson*, (1942) 19 Cal. 2d 162, 119 P. 2d 945; *Southern Pacific Co. v. Gallagher*, (1939) 306 U.S. 167; *Felt & Tarrant Mfg. Co. v. Corbett*, (1939) 306 U.S. 62. The person liable for the tax is the consumer.⁴⁵ However, every retailer subject to California's territorial jurisdiction is required to collect the tax from the consumer as the agent of the state and pay it over.⁴⁶ The tax is a debt owed the state by the seller,⁴⁷ which, nonetheless, does

⁴⁴Calif. Rev. & Tax. Code Secs. 6201-6207, inc.

⁴⁵Rev. & Tax. Code Sec. 6202.

⁴⁶Id., Sec. 6203. *Brandtjen & Kluge v. Fincher*, (1941) 44 C.A. 2d Supp. 939, 111 P. 2d 979; *American Locker Co. v. City of Long Beach*, (1946) 75 C.A. 2d 280, 170 P. 2d 1005.

⁴⁷Id., Sec. 6204.

not shift the primary liability from the consumer to the retailer.⁴⁸ The retailer is, however, liable to the state for the amount it should have collected even if it fails to collect, with a 10% penalty.⁴⁹

The use tax is then something physically collected by the seller, but it is not his tax though he is liable to pay the state if he neglects to collect it from the consumer. The Tax Court has not said explicitly it would include this collection in the seller's gross receipts, but if the language it used in declaring the test it would apply is to be taken literally, it would have to. But to do so, to hold that a seller's growth is to be measured by the amounts it is compelled by law to collect as tax collector-agent for the state, is to reduce the growth test to an absurdity.

What of bottle deposits received by a seller, subject to an obligation to return them to the customer when he returns the bottles? These deposits are ordinarily not treated by retailers as income so long as they are liable to repay them.⁵⁰ They therefore do not appear in the income tax returns on the basis of which the growth credit presumably was intended to be checked. Yet they are physically received by the seller from the sales of his stock in trade. Are they therefore gross receipts? Surely not.

These questions, we submit, indicate that the Tax Court has been deluded by the simplicity of stating the test it would apply into believing that it would be as simple to

⁴⁸*Brandtjen & Kluge v. Fincher*, supra note 46.

⁴⁹Sec. 6591.

⁵⁰*Wichita Coca Cola Bottling Co. v. United States*, (CA 5, 1945) 152 F. 2d 6, cert. den. 327 U.S. 806.

apply as it was to state. As we have demonstrated, the test leads to improbable results when applied to two common situations. This means, of course, that Congress did not have that test in mind when it enacted the statutes.

To us it seems much more reasonable to conclude that what Congress meant by "gross receipts" was the taxpayer's beneficial gross receipts, reflecting its growth, and not including variables over which it had no control and from which it could derive no possible element of growth, such as consumers' taxes it was required to collect and pay over. This interpretation will give uniform application to the law both geographically and between industries, will lend ease and simplicity to administration, and will avoid absurd distinctions. Accordingly, the contrary interpretation below should be disapproved.

CONCLUSION.

The erroneous judgment of the Tax Court should be reversed.

Dated: February 27, 1957.

Respectfully submitted,

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ARTHUR H. KENT,

VALENTINE BROOKES,

Counsel for Petitioner.

(Appendices A and B Follow.)

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Appendices A and B.



Appendix A

INTERNAL REVENUE CODE OF 1939

Sec. 435(e)(1):

(1) Taxpayers to which subsection applies.—A taxpayer shall be entitled to the benefits of this subsection if the taxpayer commenced business before the end of its base period, and if either—

(A) (i) the total assets of the taxpayer as of the first day of its base period (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter), determined under paragraph (3), did not exceed \$20,000,000, and

(ii) the total payroll of the taxpayer (as determined under paragraph (4) for the last half of its base period is 130 per centum or more of its total payroll for the first half of its base period, or the gross receipts of the taxpayer (as determined under paragraph (5)) for the last half of its base period is 150 per centum or more of its gross receipts for the first half of its base period; * * * * *

Sec. 435(e)(2):

(2) Computation.—The average base period net income determined under this subsection shall be determined as follows:

(A) By computing (in the manner provided by the second sentence of subsection (4) (1)) the excess profits net income for each of the last 24 months in the base period.

(B) By computing the aggregate of the excess profits net income for each such month.

(C) By dividing by 2 the amount ascertained under subparagraph (B).

(D) By computing the aggregate of the excess profits net income for each of the last twelve months in the base period.

(E) By computing (in the manner provided by the second sentence of subsection (d) (1)) the excess profits net income for each of the twelve months in the period beginning July 1, 1949, and ending June 30, 1950. For the purposes of this subparagraph and subparagraph (G) the excess profits net income for any month after December 1949 shall be the "weighted excess profits net income" for the taxable year in which such month falls divided by the number of full calendar months in such year, but in no case shall such excess profits net income for any month be less than zero. The "weighted excess profits net income" for any taxable year beginning before July 1, 1950, shall be—

(i) 100 per centum of the excess profits net income for the taxable year if such year ends before July 1, 1950;

(ii) 90 per centum of the excess profits net income for the taxable year if such year ends after June 30, 1950, and before October 1, 1950;

(iii) 80 per centum of the excess profits net income for the taxable year if such year ends after September 30, 1950, and before April 1, 1951; and

(iv) 70 per centum of the excess profits net income for the taxable year if such year ends after March 31, 1951.

(F) By computing the aggregate of the excess profits net income for each of the twelve months referred to in subparagraph (E).

(G) In the case of a taxpayer who is entitled to the benefits of this subsection under paragraph (1) (B) and whose excess profits net income for the calendar year 1949 is not more than 25 per centum of its excess profits net income for the calendar year 1948, by computing—

(i) in the manner provided by subparagraph (E), the excess profits net income for each of the six months in the period beginning July 1, 1948, and ending December 31, 1948, and for each of the six months in the period beginning January 1, 1950, and [ending] June 30, 1950, and

(ii) the aggregate of the excess profits net income for each of the twelve months referred to in clause (i).

The average base period net income determined under this subsection shall be the amount ascertained under subparagraph (C), (D), or (F) whichever is the highest, except that in the case of a taxpayer described in subparagraph (G), its average base period net income determined under this subsection shall be the amount ascertained under subparagraph (C), (D), (F), or (G) (ii), whichever is the highest.

Sec. 435(e)(5):

(5) Gross Receipts.—As used in this subsection the term “gross receipts” with respect to any period means the sum of:

(A) The total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, and

(B) The gross income, attributable to a trade or business regularly carried on by the taxpayer, received or accrued during such period excluding therefrom—

(i) Gross income derived from the sale, exchange, or other disposition of property;

(ii) Gross income derived from discharge of indebtedness of the taxpayer;

(iii) Dividends on stocks of corporations; and

(iv) Income attributable to recovery of bad debts.

In the event that a taxable year falls partly within such period, there shall be allocated, for the purposes of subparagraphs (A) and (B), to the portion of the year within such period an amount of the total gross receipts (as defined in such subparagraphs) for such year in the same proportion as the number of months in such year within

the period bears to the total number of months in such year.

REGULATIONS 130

Sec. 40.435-2. Average base period net income—Alternative based on growth. Section 435(e) provides alternative methods of computing the average base period net income of certain taxpayers whose growth during the base period is shown by increased gross receipts or payroll during the last half of the base period. These alternative methods are also available in certain cases to a taxpayer meeting certain tests with respect to sales of products not generally available prior to 1946.

Sec. 40.435-3. Definitions. For the purpose of section 435(e)—(a) Total assets. The term “total assets” means an amount equal to the sum of cash and property other than cash, held by the taxpayer for purposes of the business. The total assets as of any day shall be determined as of the beginning of such day. The property is to be included in an amount equal to its adjusted basis for determining gain upon sale or exchange. See, in general, section 113 and the regulations prescribed thereunder. For special rule in the case of certain intangible property, see section 441(i). If the taxpayer is a member of an affiliated group of corporations which has the privilege under section 141 of filing a consolidated return for its first taxable year ending after June 30, 1950, there shall also be included the total assets of each member of such affiliated group whether or not a consolidated return is filed, and whether or not such corporation was a member of an affiliated group including the taxpayer on the day as of

which total assets are computed. Such total assets shall be determined in a manner consistent with the principles applicable with the respect to consolidated returns.

* * * * *

(c) Gross receipts. The term "gross receipts" with respect to any period means the sum of: (1) the total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer, or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, and (2) the gross income attributable to a trade or business regularly carried on by the taxpayer, received or accrued during such period, but excluding therefrom—

(i) gross income derived from the sale, exchange, or other disposition of property;

(ii) gross income derived from discharge of the taxpayer's indebtedness;

(iii) dividends on stocks of corporations; and

(iv) income attributable to recovery of bad debts.

(d) Net Sales. The term "net sales" with respect to any period means the total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer, or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily

for sale to customers in the ordinary course of its trade or business; reduced by the amount of discounts, returns, and allowances paid or incurred for such period.

* * * * *

Sec. 40.435-4. Qualifications for computation of alternative average base period net income based on growth—

(a) In general. Section 435(e) is applicable only to a taxpayer which commenced business before the beginning of its base period and which establishes that it qualifies under either (b) or (c) of this section. A taxpayer computing its average base period net income by using an alternative based on growth shall submit with its return a full and complete statement showing the basis upon which each requirement of section 435(e) is satisfied and all the facts upon which the taxpayer relies.

(b) Eligibility requirements—General rule. A taxpayer which commenced business before the beginning of its base period shall be entitled to the benefits of section 435(e) if its total assets as of the beginning of the first day of its base period did not exceed \$20,000,000 and either—

(1) the taxpayer's total payroll for the last half (the last 24 months) of its base period is at least 30 percent greater than the taxpayer's total payroll for the first half (the first 24 months) of its base period, or

(2) the taxpayer's gross receipts for the last half (the last 24 months) of its base period are at least 50 percent greater than the taxpayer's gross receipts for the first half (the first 24 months) of its base period.

Where a taxable year falls partly within the first or second half of the base period, the amounts of the gross receipts or total payroll shall be allocated on a monthly basis to the appropriate period.

* * * * *

Sec. 40.435-5. Computation of average base period net income based on growth—(a) *Computation.* The following steps are required for the computation of average base period net income under the methods set forth in section 435(e):

(1) The excess profits net income for each of the last 24 months in the base period is determined as provided in the second sentence of section 435(d)(1).

(2) The amounts determined under (1) are aggregated.

(3) The aggregate amount ascertained under (2) is divided by 2.

(4) The excess profits net income for each of the last 12 months in the base period is aggregated.

(5) The excess profits net income (determined as provided in the second sentence of section 435(d)(1)) or the weighted excess profits net income (as defined in (b) of this section), as the case may be, for each of the 12 months in the period beginning July 1, 1949, and ending June 30, 1950, is computed.

(6) The amounts determined under (5) are aggregated.

(7) If a taxpayer meets the eligibility requirements with respect to products not generally available prior to 1946 (see section 40.435-4(c)), and does

not qualify under the general requirements for the alternative based on growth (see section 40.435-4(b)), and if its excess profits net income for the calendar year 1949 is not more than 25 percent of its excess profits net income for the calendar year 1948, then—

(i) The excess profits net income for each of the six months in the period beginning July 1, 1948, and ending December 31, 1948, and the weighted excess profits net income for each of the six months in the period beginning January 1, 1950, and ending June 30, 1950, are computed.

(ii) The amounts determined under (i) are aggregated.

(8) The average base period net income under section 435(e) is the amount ascertained under (3), (4), or (6) whichever is the highest. In the case of a taxpayer described in (7), the average base period net income is the amount ascertained under (3), (4), (6), or (7), whichever is the highest.

(b) Weighted excess profits net income. For the purpose of (a) (5) and (7) of this section, the term “weighted excess profits net income” applies to any month after December 1949, and means the weighted excess profits net income for the taxable year in which such month falls, divided by the number of full calendar months in such year. The term “weighted excess profits net income for the taxable year” applies only to taxable years beginning before July 1, 1950 (and ending after December 31, 1949), and is an amount equal to the following percentages of the excess profits net income for such taxable years:

(1) 100 percent of the excess profits net income for the taxable year if such year ends before July 1, 1950;

(2) 90 percent of the excess profits net income for the taxable year if such year ends after June 30, 1950, and before October 1, 1950;

(3) 80 percent of the excess profits net income for the taxable year if such year ends after September 30, 1950, and before April 1, 1951; and

(4) 70 percent of the excess profits net income for the taxable year if such year ends after March 31, 1951.

Appendix B

COMMITTEE REPORTS

I. Excerpt from H.Rep. No. 3142, 81st Cong., 2d Sess. (1951-1 Cum. Bul. 187, 203), and S.Rep. No. 2679, 81st Cong., 2d Sess. (1951-1 Cum. Bul. 240, 258) :

“The second test is designed to limit the benefits of the alternative credit to corporations experiencing a degree of growth during the base period which is substantially in excess of the growth of industry in general. For this purpose two indices are used, payrolls and gross receipts, and the taxpayer may qualify for the alternative basis under either one of them. If the taxpayer’s total payroll for the last half of the base period is 130 percent or more of its total payroll during the first half of the base period, it can qualify as a growing corporation. However, a taxpayer who fails to meet this test may qualify for the alternative credit if its gross receipts for the last half of the base period are 150 percent or more of its gross receipts for the first half of its base period. The use of the alternative gross receipts test is justified by the fact that a corporation may increase its physical volume of production materially by introducing additional equipment and new operating procedures which do not involve a corresponding increase in its labor force. The percentages used in the payroll and gross receipts tests are sufficiently large so that only those taxpayers will be able to qualify for the alternative credit whose business has grown substantially more rapidly than the average during the base period years.”

The Senate Report referred to contains a paragraph identical to the above except for the substitution of the following first sentence for that appearing above:

“In addition to meeting the assets test described above, a corporation desiring to use the alternative based on growth must qualify under a test designed to limit the benefits of the provision to corporations experiencing a degree of growth during the base period substantially in excess of the growth of industry in general.”

II. Excerpt from H.Rep. No. 3142, 81st Cong., 2d Sess. (1951-1 Cum. Bul. 187, 190), explaining the limitation of the credit to 85% of average base period earnings:

“4. *Average earnings credit.*

“For taxpayers on a calendar-year basis the base period under this bill is the 4-year interval 1946 to 1949. As a general rule taxpayers are permitted to eliminate one of the base-period years. The normal tax net income of the remaining years is then adjusted in a manner described below and averaged. The resulting average base period net income is then reduced by 15 percent for the purposes of the credit.

“Under the World War II law the base period was 1936 to 1939, and the credit was 95 percent of the average earnings in this period. It was necessary to substitute the period 1946 to 1949 for the 1936 to 1939 base in this bill both because of the large number of businesses which have been started recently and because of the substantial changes which have occurred in the businesses in existence between 1936 and 1939. The period 1946 to 1949 is the only recent 4-year, nonwar period available. However, it is a period of unusual business prosperity which to a substantial

degree was built on the deferred demands, the accumulated savings of World War II, and large post-war defense expenditures. Since this unprecedented level of business activity could hardly have been expected to continue permanently, the use of the income of the years 1946 through 1949, without adjustment, would produce a general overstatement of the taxpayers' earning capacity in the absence of hostilities in Korea or a large program of military expenditures. For this reason your committee believes that a 15 percent cut-back in average base period income is a moderate adjustment."

The Senate Finance Committee report (S.Rep. No. 2679, 81st Cong., 2d Sess., 1951-1 Cum. Bul. 240, 243) contains an almost verbatim duplicate of the foregoing explanation.



No. 15334

**In the United States Court of Appeals
for the Ninth Circuit**

LUCKY LAGER BREWING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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FILED

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 34-48) are reported at 26 T.C. 836.

JURISDICTION

The Commissioner determined a deficiency against taxpayer in income and excess profits taxes for the calendar year 1950 in the amount of \$102,343.94, of which \$92,108.20 is in dispute. (R. 35.) Taxpayer was notified of the deficiency on April 6, 1954 (R. 11), and on May 24, 1954, filed a petition for review thereof with the Tax Court (R. 3, 5-10) under the provisions of Section 272 of the Internal Revenue Code of 1939. The decision of the Tax Court was entered on July 23, 1956.

(R. 4, 49.) A petition for review by this Court of the Tax Court's decision (R. 50-54) was filed on September 27, 1956 (R. 4). This Court accordingly has jurisdiction of the case under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether taxpayer's "gross receipts" under Section 435(e) of the Internal Revenue Code of 1939 were the "total amount received or accrued * * * from the sale * * * of [its] stock in trade", as the statute provides, or that amount less the amounts taxpayer paid as federal and state beer excise taxes.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 435 [As added by Sec. 101 of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*— * * *

* * * *

(b) *Base Period.*— * * *

(c) *Average Base Period Net Income—Determination.*— * * *

(d) *Average Base Period Net Income—General Average.*— * * *

* * * *

(e) [as amended by Sec. 504(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] *Average Base Period Net Income—Alternative Based on Growth.*

(1) *Taxpayers to which subsection applies.*—
A taxpayer shall be entitled to the benefits of

this subsection if the taxpayer commenced business before the end of its base period, and if either—

(A) (i) the total assets of the taxpayer as of the first day of its base period (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter), determined under paragraph (3), did not exceed \$20,000,000, and

(ii) the total payroll of the taxpayer (as determined under paragraph (4)) for the last half of its base period is 130 per centum or more of its total payroll for the first half of its base period, or the gross receipts of the taxpayer (as determined under paragraph (5)) for the last half of its base period is 150 per centum or more of its gross receipts for the first half of its base period; or

* * * * *

(5) *Gross Receipts*.—As used in this subsection the term “gross receipts” with respect to any period means the sum of:

(A) The total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, and

(B) The gross income, attributable to a trade or business regularly carried on by the taxpayer, received or accrued during such period excluding therefrom—

(i) Gross income derived from the sale, exchange or other disposition of property;

(ii) Gross income derived from discharge of indebtedness of the taxpayer;

(iii) Dividends on stocks of corporations; and

(iv) Income attributable to recovery of bad debts.

* * * *

(26 U. S. C. 1952 ed., Sec. 435.)

Treasury Regulations 130, promulgated under the Internal Revenue Code of 1939:

SEC. 40.435-2. *Average base period net income—Alternative based on growth.*—

Section 435 (e) provides alternative methods of computing the average base period net income of certain taxpayers whose growth during the base period is shown by increased gross receipts or payroll during the last half of the base period * * *

SEC. 40.435-4 [As amended by T.D. 5973, 1953-1 Cum. Bull. 321]. *Qualifications for computation of alternative base period net income based on growth.*—

(a) *In general.*— * * *

(b) *Eligibility requirements—General rule.*—A taxpayer which commenced business before the end of its base period shall be entitled to the benefits of section 435(e) if its total assets as of the beginning

of the first day of its base period did not exceed \$20,000,000 and either—

* * * * *

(2) the taxpayer's gross receipts for the last half (the last 24 months) of its base period are at least 50 percent greater than the taxpayer's gross receipts for the first half (the first 24 months) of its base period.

* * * * *

STATEMENT

The Tax Court's findings of fact (R. 35-42) may be restated as follows:

Taxpayer is a California corporation which brews and sells beer. It keeps its books on the accrual basis of accounting and uses the calendar year. (R. 35.)

Its base period for excess profits tax purposes was the calendar years 1946, 1947, 1948, and 1949. The adjusted basis of the assets it held on January 1, 1946, was less than \$20,000,000. It did not have the privilege of filing a consolidated return with any other corporation for 1950 (the taxable year) or any other year. (R. 35.)

The following represent, for the base period years, the total amounts received or accrued by taxpayer from the sale of beer and reported by taxpayer on its income tax returns as gross sales (R. 35-36):

1946	\$12,878,751.99
1947	16,311,138.47
	<hr/>
	\$29,189,890.46
1948	\$18,161,135.39
1949	23,003,696.22
	<hr/>
	\$41,164,831.61

The total for the later two years is 141 per cent of the total for the prior two years. (R. 36.)

In its income tax returns for the base period years taxpayer deducted, as part of the cost of goods sold, the following amounts of federal and state excise taxes paid or accrued upon beer manufactured and sold (R. 36) :

1946	\$4,849,076.70
1947	5,687,831.75
1948	5,837,412.88
1949	7,192,289.27
	\$23,566,610.60

If these amounts are excluded from gross sales, the total for the later two years is 150.8 per cent of the total for the prior two years. (R. 36.)

Taxpayer had additional items of gross receipts in the base period years. When those figures are added to gross sales, the ratio *including* excess taxes is 140.9 per cent and the ratio *excluding* excise taxes is 150.57 per cent. Other income during the base period years does not significantly affect the ratios. (R. 36-37.)

On invoices covering shipments to customers within the United States, taxpayer did not state beer excise taxes separate from unit prices. Invoices covering shipments to United States territories (e.g., Hawaii) stated that federal tax was paid and the shipment was exempt from state tax. Invoices covering shipments to United States possessions (e.g., Samoa) stated that the shipment was tax-free. (R. 37.)

During the years 1946 through 1949, taxpayer published, for various trading areas, price schedules showing sale prices and terms. It regularly filed copies of schedules covering California areas with the California

Board of Equalization pursuant to law. The California schedules did not state excise taxes separately. Price schedules for Nevada bore the notation that Nevada state tax was not included. Nevada schedules dated on and after February 1, 1948, specifically deducted California tax. The prices in Nevada from December 1, 1946, to February 1, 1948, were identical to those in Los Angeles from November 15, 1946, to June 20, 1947. Schedules for exports to United States possessions and foreign countries deducted both state and federal taxes in the explanation of the price. Taxpayer did not alter its methods of invoicing or pricing after March 1, 1950. It followed the general procedure in the brewing industry of not showing excise taxes separately on invoices or price lists. (R. 37-38.)

Taxpayer's published annual reports for 1946 through 1949 reported the same gross sales as shown on the returns. They did not show excise taxes separately. (R. 38.)

Prior to March 1, 1950, breweries paid federal excise tax by stamps. Taxpayer carried the amount of unused stamps on hand, along with any state stamps, in an account entitled "Revenue Stamps on Hand". It carried this account as a separate item under "Current Assets" in the annual report, rather than as an inventory item. When beer was canned or bottled, it transferred the amount of stamps surrendered from "Revenue Stamps on Hand" to "Tax on Canned Beer" or "Tax on Bottled Beer". It paid state tax by monthly return on the previous month's sales. After March 1, 1950, federal tax was collected by stamp after the bottled or canned beer was withdrawn for sale or consumption. The beer tax statute remained unchanged during any material year. (R. 38-39.)

Taxpayer credited refunds to the "Tax on Bottled Beer" or "Tax on Canned Beer" accounts, except one substantially delayed refund in 1949, which it credited to "Miscellaneous Income". (R. 38.)

Taxpayer's accounts reflect manufacturing processes from the purchase of raw materials through the brewing, placement of beer in fermenting tanks, movement to aging tanks in cellars, and transfer to the bottling and canning lines. After packaging, beer is sent to the shipping warehouse and from there to distributors. "Inventory Beer in Process", to which a large bulk inventory is transferred when the beer reaches the cellars, reflects costs incurred up to that point including real and personal property taxes and social security taxes. After aging, the beer is withdrawn for bottling and canning, at which time costs of inventory in process are apportioned to a bottled beer cost account and a canned beer cost account, to which accounts bottling and canning costs are also charged. Warehousing and shipping costs are allocated to the bottled beer and canned beer cost accounts, which then show the total cost of beer produced exclusive of excise taxes. (R. 39.)

Taxpayer carried beer on hand in inventory. It recorded taxes paid on unshipped beer in accounts entitled "Inventory—Bottle Tanks—Federal Tax" and "Inventory—Canned Beer—Federal Tax." On the balance sheet it combined these accounts into "the inventory of federal tax", which in turn it combined with the bottled and canned beer cost accounts to arrive at a total inventory figure. (R. 39.)

Since March 1, 1950, taxpayer has used the same accounting method, except that it shows no federal tax related to inventories, since it pays no tax until the

beer is sold. Its method of invoicing and pricing of merchandise remained unchanged. The tax now appears as an expense in the month when the liability accrues, as state excise taxes had always been handled. (R. 40.)

Taxpayer increased its over-all average prices, exclusive of excise taxes, for 1948 and 1949 over 1946 and 1947 by 21.6 per cent. Excise tax rates did not change during the base period. (R. 40.)

No single classification of excise taxes is customary in accounting practice. Some are included in gross sales in corporate returns, while others are customarily excluded. Reports to stockholders generally conform to the company books, but may differ from the tax returns due to statutory requirements of tax reporting. (R. 40.)

Where excise taxes are included in gross sales, tax returns and corporate reports subtract them as part of cost of goods sold, or as an expense deduction, or as a deduction from gross sales in arriving at net sales. Net sales for one period are frequently compared with those of another to determine a company's growth. (R. 40.)

Petroleum companies exclude federal and state gasoline taxes from gross sales. Retail establishments exclude state and city retail sales taxes, as well as luxury taxes, such as on furs. The federal tax on phonographs and television sets is customarily excluded. Those taxes are not regarded as an item of income or expense. (R. 40-41.)

None of nine breweries chosen at random from Securities and Exchange Commission records excluded the excise taxes from gross sales, all reporting the to-

tal proceeds from beer sales. These breweries treated excise taxes in three different ways: Seven deducted the taxes from gross sales to arrive at net sales; another deducted both cost of goods sold and excise taxes from sales to determine gross profit; the ninth included excise taxes in cost of goods sold, dropping a footnote thereto stating that excise taxes of a certain amount were included. (R. 41.)

A manufacturer makes no distinction as to excises on sales to a distributor or directly to the consumer. (R. 41.)

Amounts of retail sales taxes collected, sometimes unknown, do not necessarily correspond to the amounts excluded from gross sales. California practice calls for application to the gross collections of a percentage based on an analysis of purchases as agreed to by the State Board of Equalization. Even though the retailer records the actual tax collected, he must apply the tax rate to his sales regardless of collections. Fractional differences in certain transactions necessarily result in an overage or shortage. Failure of collections to correspond to exclusions from gross sales does not improperly reflect income. (R. 41.)

“Gross receipts” is not clearly or precisely defined by accountants, who usually keep accounts on the basis of “gross sales” and “net sales”. (R. 42.)

Taxpayer’s excess profits net income was overstated in the notice of deficiency by \$70,772.21 for 1949, but understated by that amount for 1948. (R. 42.)

Taxpayer’s gross receipts for the last half of the base period are less than 150 per cent of its gross receipts for the first half of its base period. (R. 42.)

The Tax Court held that taxpayer’s “gross re-

ceipts" for the base period years (1946 through 1949) included the total amounts it received from the sale of its beer, not just those amounts less the federal and estate excise taxes it paid or accrued, and that, therefore, in computing its excess profits tax credit taxpayer is not entitled to the benefits of the growth formula provided in Section 435(e) of the Internal Revenue Code of 1939. (R. 42-48.)

SUMMARY OF ARGUMENT

In computing its excess profits tax credit, taxpayer is entitled to use the growth formula provided in Section 435(e) of the 1939 Code only if its "gross receipts" for the last half of its base period (the years 1946 through 1949) were 150 per cent of its gross receipts for the prior two years. They were not. Taxpayer's contrary position is based upon a contention that its "gross receipts" for the base period years were its gross sales *less* the amounts it paid as federal and state beer excise taxes, whereas the statute specifically defines "gross receipts" as including, without any qualification, the "total amount received or accrued * * * from the sale * * * of stock in trade". It is not contended that the amounts of the beer taxes were received by taxpayer as a trustee or fiduciary and such a contention would in any event be without merit. The federal beer tax was a tax liability of taxpayer as being imposed on the manufacture, not the sale, of beer. The tax liability was one whose economic burden could be passed on to consumers but in that respect it was no different from a tax on real or personal property or from any other expense connected with the manufacture of the beer and reflected in the sales price. If passed on, the

amounts of the beer taxes were nevertheless a part of the total amounts received by taxpayer from the sale of its beer. The statutory definition of "gross receipts" precludes an interpretation of the term "gross receipts" as permitting a deduction of the beer taxes from gross sales.

It is no answer to say, as taxpayer does, that the amounts of the beer taxes were not received "from the sale * * * of stock in trade" because taxpayer was not in the business of selling excise taxes. Whatever amounts taxpayer added to its sales prices because of the tax were paid by the purchasers to get the beer and for nothing else.

Contrary to taxpayer's contention, there is no occasion to interpret the statutory definition of "gross receipts" contrary to its express language. The Congressional intent is entirely consistent with the statutory language. Taxpayer's argument to the contrary is based on an assumption that the "gross receipts" test was intended as an accurate measurement of growth in terms of physical volume of production as related to different corporations and industries, whereas Congress used the "gross receipts" test as an objective one which, without precise regard to proportionate increases in physical volume of production as between different corporations and industries, would operate to exclude those corporations from use of the growth formula whose growth had not been substantially more rapid than the average. Taxpayer has not shown, and cannot show, that it qualifies for use of the growth formula on the basis of its increase in physical volume of production. The state decisions on which taxpayer relies are inapposite

as involving taxes laid on the sale of a product rather than on its manufacture—situations where the seller was in the position of a conduit for collection of a tax.

ARGUMENT

Taxpayer's "Gross Receipts" Under 1939 Code Section 435(e) Were the Total Amounts It Received From the Sale of Its Beer, Not Those Amounts Less the Federal and State Beer Excise Taxes It Paid

Taxpayer is seeking to compute its excess profits tax credit for 1950 with the use of the growth formula provided in Section 435(e)(2) of the Internal Revenue Code of 1939, printed in Appendix A to taxpayer's brief, pp. i to iii. It is eligible to use that formula only if it meets the requirement of Section 435(e)(1)(A)(ii), *supra*, that its—

gross receipts * * * (as determined under paragraph (5)) for the last half of its base period [the years 1946 to 1949, inclusive] is 150 per centum or more of its gross receipts for the first half of its base period; * * *

Taxpayer's claim that it meets this requirement is based upon its interpretation of the words "gross receipts" as meaning (aside from other gross income) the amounts it~~y~~ received from the sale of its beer *less* the amounts it paid or accrued in the base period years as federal and state beer excise taxes. It is only when the amounts of the excise taxes are deducted from the amounts received that the ratio of gross receipts for the last two years of the base period is 150 per cent or more (actually 150.57 per cent) of

the gross receipts for the prior two years.¹ The Tax Court held that the amounts paid as beer excise taxes cannot be deducted to arrive at "gross receipts" (R. 42-48) and that holding, we submit, is correct.

It is "gross receipts * * * (as determined under paragraph (5))" to which the eligibility requirement of Section 435(e)(1)(A)(ii) has reference. Paragraph (5), *supra*, specifically defines "gross receipts" for any period as meaning, so far as pertinent here, (a) "The total amount received or accrued during such period from the sale * * * of stock in trade of the taxpayer * * *" and (b) other gross income with certain exceptions. Quite obviously, "The total amount received or accrued during such period from the sale * * * of stock in trade of the taxpayer", which is the only part of the definition with which we need here be concerned, means gross sales. In any event, "gross receipts" includes the "total amount received or accrued" by taxpayer from the sale of its beer (its stock in trade), not that amount less some part thereof, such as the amounts of the beer excise taxes. There is no contention that taxpayer received the amounts of the beer excise taxes as a trustee or fiduciary, rather than in its own right, and any such contention would be without merit. As the Tax Court stated (R. 48), taxpayer could pass on the economic burden of the taxes but the tax liability was its own. See *Lash's Products Co. v. United States*, 278 U. S. 175, and other cases cited by the Tax Court, R. 48. Thus, there is no possible justification for deducting the amounts of the beer excise taxes from the "total amount received or accrued" by taxpayer from the sale

¹ If the federal tax is not eliminated, taxpayer does not qualify as a corporation entitled to use the growth formula even disregarding the state tax. (R. 48, fn. 8.)

of its beer. The statutory definition of "gross receipts" is conclusive and prohibits the deduction of the amounts of the excise taxes from taxpayer's "gross receipts".

Taxpayer's argument to the contrary (Br. 15-25) is based upon the fact that under the statutory definition of "gross receipts" the amounts received must be "from the sale * * * of stock in trade of the taxpayer". Ignoring the words "total amount received or accrued * * * from", taxpayer asserts that beer, not excise taxes, was its stock in trade and that it was in the business of selling beer, not excise taxes. (Br. 20.) We agree that taxpayer did not sell excise taxes, that beer was its stock in trade, and that beer is what it sold. But that is merely to say that the amounts taxpayer received from its customers were amounts received from the sale of beer, its stock in trade. As the Supreme Court stated in *Lash's Products Co. v. United States*, *supra*, p. 176—

The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. * * *

* * * The amount added because of the tax is paid to get the goods and for nothing else.

Taxpayer itself recognized that the amounts of the beer taxes were received by it from the sale of its beer, for in its income tax returns and in its published annual reports its "gross sales" included the amounts of the tax. (R. 35-36, 38.)

Taxpayer argues that, to the extent of the amounts of the beer excise taxes, the amounts it received from its customers were not "receipts" and were not "received" by it from the sale of its stock in trade because the amounts of the excise taxes constituted reimburse-

ment for taxes already paid and were therefore not profit to taxpayer. (Br. 22.) The same argument could be made in respect of other taxes paid by taxpayer, such as real and personal property taxes, and as to any and all other items of cost and expense in relation to the beer. But that would be to make eligibility for use of the growth formula depend upon *net* sales or *net profit*, whereas the test provided by Congress is with respect to “*gross receipts*” (italics supplied), defined as including the “total” amount received or accrued from the sale of stock in trade.

Taxpayer’s criticism of the Tax Court’s interpretation of the definition of gross receipts as rendering a large part of the statutory definition surplusage (Br. 23-25) is unjustified. The criticism is based upon an assumption (see Br. 24) that the Tax Court interpreted the statutory words “total amount received” as including everything received by the corporation irrespective “of what the amounts were received for”. While the Tax Court did at one point refer to the statutory words “as including everything received by the corporation in its own right” without specifying for what it was received, the reference obviously was to receipts from sales, for the Tax Court specifically stated that the beer taxes “were included in the amount received for its stock in trade by petitioner”. (R. 47.) In a subsequent part of its brief taxpayer criticizes the Tax Court’s interpretation of the statutory definition by making a tangential argument regarding use taxes collected by a retailer but for which the consumer has the primary responsibility. (Br. 49-50.) That argument ignores the fact that the Tax Court’s interpretation of the statutory definition (R. 47) was that it includes amounts received, from the sale of stock in trade, by the vendor “in its own right”.

Taxpayer makes arguments which are apparently designed to show that the Congressional intent and purpose is such that the statutory definition of "gross receipts" should be interpreted contrary to its literal language. The arguments have no merit, as we shall now show.

(1) One argument is that the Congressional purpose will be served if taxpayer is allowed to use the growth formula for computing its excess profits credit, under which its 1950 profits would be compared with its 1949 profits, because, in view of its growth in each successive base period year, the increase in its profits for 1950 over 1949 reflects the increase in its profits due to the Korean conflict and that is what Congress intended to tax. (Br. 10-13.) The argument is fallacious in that it overlooks that Congress assumed that all corporations would have increased profits due to the Korean conflict (see Br. 11, 27-28) and provided for an excess profits credit which, so far as pertinent here, had to be used by a corporation unless its business grew so "substantially more rapidly than the average during the base period years" that it became eligible to use the different growth formula provided in Section 435(e), *supra*. H. Rep. No. 3142, 81st Cong., 2d Sess., p. 24 (1951-1 Cum. Bull. 187, 203); S. Rep. No. 2679, 81st Cong., 2d Sess., p. 27 (1951-1 Cum. Bull. 240, 258). In brief, this argument of taxpayer merely leads back to the question of whether taxpayer meets the eligibility requirement for use of the growth formula.

(2) On the premise that Congress intended the "gross receipts" test to "accurately" and "properly" (Br. 27) measure a corporation's growth in terms of its increase in physical volume of production (Br. 26-27), taxpayer makes a lengthy argument (Br. 28-40)

intended to support its assertion that the inclusion of the amounts of the beer excise taxes in "gross receipts" produces "an unintended lack of uniformity in the operation of the statute" (Br. 33) and then, without any supporting argument, taxpayer concludes its brief with a statement that its own interpretation of the statutory definition "will give uniform application to the law * * *, will lend ease and simplicity to administration, and will avoid absurd distinctions" (Br. 51). The arguments are both specious and fallacious.

If taxpayer were correct in assuming that the pertinent eligibility requirement was intended to "accurately" and "properly" measure growth by physical volume, how would taxpayer qualify for use of the growth formula"? The eligibility statute (Section 435(e)(1)(A)(ii)) does not state what percentage of increase in physical volume is sufficient. In terms of percentage alone, the increase must be 50 per cent for the last two years of the base period (150 per cent of the first two years) and taxpayer does not contend that it had any such an increase in physical volume. Actually, its increase in physical volume was apparently about 23.66 per cent.²

But of course the "gross receipts" eligibility requirement was not intended to "accurately" measure the increase in physical volume. What Congress said with respect to it (H. Rep. No. 3142, *supra*, p. 24 (1951-1 Cum.

² We have arrived at this figure on the assumption that the physical volume of taxpayer's production can be determined, at least with approximation, by dividing the total amount of the excess taxes it paid for any given year by the rate of tax, \$8.62 a barrel (\$8 a barrel for the federal tax (Br. 3) and \$.62 a barrel for the state tax (Act 3796 of the General Laws of California, Sec. 23)), which remained constant throughout the base period years.

Bull. 187, 203) ; S. Rep. No. 2679, *supra*, p. 27 (1951-1 Cum. Bull. 240, 258)) is that—

The *use* of the alternative gross receipts test *is justified* by the fact that a corporation may increase its physical volume of production materially by introducing additional equipment and new operating procedures which do not involve a corresponding increase in its labor force [the alternative eligibility requirement under which taxpayer cannot qualify]. *The percentages used in the payroll and gross receipts tests are sufficiently large so that only those taxpayers will be able to qualify for the alternative credit whose business has grown substantially more rapidly than the average during the base period years.* (Italics supplied.)

As the Tax Court stated (R. 46)—

Neither the gross receipts test nor the payroll test, which is the alternative, are direct measures of physical volume of production. Gross receipts may rise at least in part due to an increase in the price of the commodity sold, as they did in the present case.

Congress was concerned with an increase in physical volume of production but its intent and purpose was to provide an eligibility test *not* based on increase in physical volume of production but which, because of the high percentages used therein would normally have the effect of excluding from use of the growth formula those businesses whose increase in physical volume was not substantially more rapid than the average. The “gross receipts” test was not intended to accurately measure growth by physical volume of production; it

was intended simply as an objective test of exclusion from use of the growth formula.

Taxpayer's arguments and examples relating to discrimination and lack of uniformity (Br. 33-39) have relation to the application of the "gross receipts" test on the basis of *growth in the physical volume of production* rather than on the basis of gross receipts. Taxpayer's particular complaint seems to be that inclusion of the beer excise tax in its gross receipts requires "more growth" from it than from other corporations. (Br. 33.) But, as already shown, Congress did not provide a test by which one corporation's growth in volume of production could be accurately measured against another corporation's growth in volume of production. Naturally, a test based on gross receipts will not accurately reflect the proportion of increase in the volume of production as between different corporations or business. That is true whether the comparison is made with relation to beer excise taxes, as taxpayer makes it, or as to any other tax or item of expense paid by a corporation. Theoretically, under the "gross receipts" test eligibility for use of the growth formula could even be created by a 50 per cent increase in the selling price of the commodity without any addition to physical volume of production, whereas a corporation with a substantial increase in physical volume of production but no increase in price might not be able to qualify for use of the growth formula. But lack of uniformity as related to physical volume of production is not a ground for rewriting the "gross receipts" test. That test is one under which taxpayer is excluded from use of the growth formula no matter how its growth

in volume of production compares with other corporations or industries, for Congress assumed that, if a taxpayer could not meet that test, its growth was not substantially more rapid than the average so as to justify use of the growth formula. Taxpayer simply has not shown any Congressional intent or purpose warranting a construction of the definition of "gross receipts" contrary to its express language.

It should also be noted that taxpayer is in error in asserting (Br. 51) that its "interpretation" of the words "gross receipts" as permitting deduction of the amounts of its beer excise taxes "will give uniform application to the law * * *, will lend ease and simplicity to administration". To accept taxpayer's "interpretation" is to embark upon an emasculation of the statutory language. If taxpayer were allowed to deduct the amounts of its beer excise taxes from its "gross receipts", why should not this taxpayer and other taxpayers be allowed to deduct their real and personal property taxes and any other expense connected with their business? To say that they can is to replace the "gross receipts" test with a "net income" test.

It is the "gross receipts" test as applied in the light of the definition of "gross receipts" contained in the statute which is simple and easy of application. It just does not have the result taxpayer would like for it to have as applied to itself. Taxpayer barely qualifies under the requirement that gross receipts for the last half of the base period be 150 per cent of the gross receipts for the prior two years even when the amounts of the excise taxes are deducted from its gross receipts. To allow that deduction is to hold

that this taxpayer may use the growth formula even though it does not qualify therefor under the test provided by Congress.

Taxpayer explains that the statutory phrase "gross receipts" is not in general use in accounting or in income tax law (Br. 40-43) and argues that a decision that excise tax collections are not part of gross receipts "gives less administrative difficulty" (Br. 42). But this Court does not have power to rewrite the statutory definition of "gross receipts" on the ground that a different definition will give less administrative difficulty. Moreover, there is no particular administrative difficulty connected with the present definition. The term "gross receipts" is a broad and reasonably well understood term and is defined without qualification as including the "total amount received * * * from the sale * * * of stock in trade."¹ Thus, "gross receipts" obviously includes "gross sales", a term in which this taxpayer and nine other breweries chosen at random included the beer excise taxes. (R. 35-36, 41.)

Finally, taxpayer relies upon certain state decisions for an interpretation of the statutory definition as permitting the deduction of the beer excise taxes. (Br. 43-46.) The cases all involved the interpretation of state statutes. The only one involving the federal tax on liquor (*F. Strauss & Son v. Coverdale*, 205 La. 903, 18 S. 2d 496) is obviously inapposite.³ In three of the cases (*Standard Oil Co. v. State Tax Com'r*, 71 N. D. 146, 299 N.W. 447; *Standard Oil Co. v.*

³ The holding there was only that the federal tax on liquor is not includible in the inventory value of property for the purpose of a local *ad valorem* tax. In contrast, as the present record shows (see R. 68), in California the tax base for personal property taxes includes the federal beer excise tax.

Michigan, 283 Mich. 85, 276 N.W. 908; *Ross Jewelers v. State*, 260 Ala. 682, 72 S. 2d 402) it was held that, under the particular statute involved, the federal gasoline tax or the federal excise tax on luxuries was not includible in the base on which a state sales tax was payable. In the other case (*Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 287 N.Y.S. 288), the state sales tax was held to be excludable from the base on which a city sales tax was payable. In all four cases the courts stressed (1) the fact that the excluded tax was imposed only upon the *sale* of the article and (2) that an interpretation of the state statute as imposing a tax upon a tax should be avoided.

The holdings that a tax on *sales* should be excluded from the base on which a state or city sales tax is to be paid do not in any way support a conclusion that the federal beer excise tax should be excluded from gross receipts in determining eligibility for use of the growth formula in computing the excess profits tax credit. The state cases involved situations where the seller was but a conduit for collection of a tax, whereas the federal beer excise tax is a tax on the manufacture, not the sale, of beer.⁴ That type of tax is a part of the price, and therefore of the amount received by the seller, for the beer. *Lash's Products Co. v. United States*, 278 U.S. 175. Indeed, in one of the cases relied upon by taxpayer (*Ross Jewelers*

⁴ The federal beer excise tax is imposed "on all beer, * * * brewed or manufactured and sold, or removed for consumption or sale * * *" (italics supplied). Sec. 3150(a) of the 1939 Code. The tax is accordingly laid on the manufacture of the beer, not on its sale. See *Lash's Products Co. v. United States*, 278 U.S. 175; *Liggett & Myers Co. v. United States*, 299 U.S. 383.

v. *State, supra*, p. 690) the tax excluded from the base for payment of the state sales tax was distinguished from a tax imposed upon the seller.

Contrary to taxpayer's assumption (Br. 43), the statutory definition of "gross receipts" is not "in doubt". There is no occasion for resort to an interpretation of the definition on the basis of state decisions or otherwise. The federal beer excise tax is so clearly a part of the vendor's "gross sales", and thus of its "gross receipts", that taxpayer and other breweries included it in their "gross sales". (R. 35-36, 41.) Taxpayer did not even separately state the amount of the tax in either its sales invoices or price schedules. (See R. 37, 38; Stip. Exs. III and IV.)

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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No. 15,334

IN THE

United States Court of Appeals
For the Ninth Circuit

LUCKY LAGER BREWING COMPANY,
a corporation,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Review of The Tax Court of the United States.

PETITIONER'S REPLY BRIEF.

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On Review of The Tax Court of the United States.

PETITIONER'S REPLY BRIEF.

A. ALTHOUGH THE LITERAL WORDS OF THE STATUTE DO NOT COMMAND SUPPORT OF HIS POSITION, RESPONDENT HAS BASED HIS ENTIRE CASE ON THEM, IGNORING THE PRINCIPLE THAT EVEN LITERALNESS MUST GIVE WAY TO A REASONABLE RESULT CONSONANT WITH THE PURPOSE AND INTENDED EFFECT OF A STATUTE.

1. Anyone familiar with this case must wonder what position respondent will adopt concerning retail sales taxes, and other taxes which in accounting practice are customarily omitted from reported gross sales.

Consider a retailer in California. It pays a sales tax to the State and others to cities. It adds something to the price of the articles it sells to its customers in order

to obtain reimbursement for the sales tax, and its actual reimbursements may be either more or less than the sales tax payable (R. 41). The retail sales tax payable is customarily excluded by retailers from their reports of income, so the amount of retail sales taxes paid will not appear in the reported gross receipts or gross sales (R. 40-41).

What is to be done with these retail sales taxes? Is the Internal Revenue Service to include them in "gross receipts" for purposes of determining growth, even though they appear nowhere in the base period income tax returns? The Tax Court said yes. It said the character of the excise tax was not determinative (R. 42), that gross receipts included "everything received by the corporation in its own right" (R. 47).

Respondent should support the Tax Court in this. And in the summary of argument he would appear ready to do so, for he says (Resp. Br. 12):

"Whatever amounts taxpayer added to its sales price because of the tax were paid by the purchasers to get the beer and for nothing else."

Since customers pay retailers an element of retail sales tax reimbursement in order to get the goods retailers sell, what respondent says of the beer excise taxes is of equal application to the retail sales taxes, so one would expect respondent to argue for the inclusion in "gross receipts" of retail sales taxes reimbursements.¹

¹The same implication appears in the following remark by respondent (Resp. Br. 14):

"As the Tax Court stated (R. 48), taxpayer could pass on the economic burden of the taxes but the tax liability was its own."

Our opening brief assumed that respondent would accept and defend the Tax Court's view in this respect, and we argued on that premise. Of course, while that court's interpretation would avoid the difficulty of construing the statutory term "gross receipts" to mean one thing when retail sales taxes are concerned and something different when beer excise taxes are involved, it does greatly magnify the lack of uniformity which flows from the decision below. See Pet. Op. Br. pp. 35-39, inclusive.

But if respondent agrees with the Tax Court that the result is the same whether sales taxes or other types of excises are involved, why does he argue that the beer excise tax is not a sales tax? See Resp. Br. 11, 23, 24. And why does respondent attempt to distinguish the cases on which we rely for the proper interpretation of "gross receipts" on the ground that they involved sales taxes and not beer excise taxes (Resp. Br. 23-24)? The Tax Court thought it made no difference. Does respondent disagree with the court he seeks to sustain?

We can, however, meet respondent on the ground he now appears to be choosing. The federal beer excise tax is a sales tax.² The statute³ imposed the tax on "all beer . . . brewed or manufactured and sold, or removed for consumption or sale, within the United States" (Emphasis added.) The effect of the double requirement that the beer taxed be both manufactured and sold in

²Inasmuch as it was the 1939 Internal Revenue Code which was in effect in the years 1946-1949, the base period, our discussion will be entirely in the light of its provisions.

³Sec. 3150, 1939 I.R.C.

the United States was to exclude from the tax both imported beer, which was subject to a customs duty (Tit. 19, USCA, Sec. 1001, Par. 805), and exported beer, which had to compete in foreign markets. Beer produced in the United States was taxed if sold in the United States, and was taxed when sold or removed for sale.

The beer excise tax thus follows the pattern of federal excise taxes. Compare, for example, Section 3412, which imposes a gallonage tax "on gasoline sold by the producer". Again, unless there is a producer (manufacturer) there is no tax, but also there is no tax unless there is a sale. Yet respondent would distinguish cases excluding collections on account of the federal gasoline tax on the ground it, but not the beer tax, is a sales tax. (Resp. Br. 23.)

The fact is that the standard federal excise tax, found in a chapter of the Code denominated "manufacturers' excise taxes", is a sales tax, because the tax does not arise until and unless the product is sold. Sections 3400(a), 3401, 3403-3409, inc., 1939 Code. None of these sections requires the manufacturer to pass the tax on. In this respect the federal admissions tax is different: Section 1715(a) of the 1939 Code required that it be passed on, and Section 1702 required that the price ex tax, and therefore inferentially the tax as well, be separately printed on the ticket. Yet in accounting practice no distinction is drawn between the federal admissions tax, on the one hand, which contains such a requirement, and the federal excise taxes on gasoline (Sec. 3412) and phonographs (Sec. 3404), on the other, which do not. (R. 81.)

However, everyone knows that these excises are customarily passed on, whether legally required to be or not, by the inflexible laws of economics.⁴ Congress is not unaware of this. Its entire excise tax program accepts the postulate that its excise taxes are economically consumers' taxes. Accordingly, when it framed Section 3441(a), defining the sales price for those excises which are percentages of the sales price,⁵ it provided "but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge." Furthermore, when these taxes first became effective, sellers who could not pass the tax on by reason of prior contractual limitations were not taxed; instead the vendee was then taxed. Sec. 3447, 1939 Code.

The nature of both the manufacturers' excises and the beer tax as sales taxes is most clearly revealed, of course, by the floor stocks tax provisions. When these taxes were enacted or increased in 1940 and 1941, floor stocks of goods already manufactured but which were still held for sale by anyone other than the manufacturer were subjected to tax. See, for example, Section 3400(b), 1939 Code. There was also a floor stocks tax on beer in the 1939 Code (Sec. 3191), applicable to beer held for sale on July 1, 1940, by anyone other than the manufacturer. These provisions show that the economic burden of the tax is intended to be on the consumer, and where the

⁴Due, John F., *Government Finance*, (Irwin, 1954) pp. 281-303; Shultz and Harriss, *American Public Finance* (5th Ed., Prentice-Hall, 1949) pp. 198-212, 223-226; Cf. H. C. Simmons, *Federal Tax Reform*, (Univ. of Chicago Press, 1950) pp. 36-37. Relevant extracts from two of these texts are reproduced in the Appendix.

⁵Such as the excise tax on phonographs and television sets.

normal collection from the manufacturer does not place it so, special adjustments to reach the consumer are enacted. See *S. Strauss & Sons, Inc. v. Coverdale*, (1944) 205 La. 903, 18 So. 2d 496.

The nature of the beer excises as sales taxes also appears from the stipulated (R. 29) fact that "if during the process of bottling, or later, beer was spoiled, was lost, or was sold to another brewer in bond, the amount of the stamps was refundable to taxpayer." This stipulation was based on Sections 3153 and 3154, providing for refund of tax if the product became unsalable.

The essential similarity of these excises as well as of the beer excises to a classical type of sales tax can be seen from a consideration of the excise tax on sales imposed by the California statutes.⁶ The statute provides that the tax imposed shall be collected by the retailer from the consumer insofar as it can be done, and makes it a misdemeanor for any retailer to advertise or hold out or state to any customer that the retailer is absorbing the tax or any part thereof or will refund the tax, if it is added to the price.⁷ Despite these statutory provisions, it is the established law that the retailer has no right of action against the consumer for the tax unless the consumer has agreed to pay reimbursement for the tax as part of the price and has failed to do so.⁸ The

⁶Revenue and Taxation Code of California, Sec. 6051 et seq.

⁷See *ibid.*, Secs. 6052, 6053.

⁸*Clary v. Basalt Rock Co.*, (1950) 99 Cal.App. 2d 458, 222 P. 2d 24; *Pacific Coast Engineering Co. v. State of California*, (1952) 111 Cal.App. 2d 31, 244 P. 2d 21; Opinion of Attorney General (California), No. 52/178, Dec. 16, 1952, CCH Cal.Tax Cas. No. 200-197; *Livingston Rock & Gravel Co., Inc. v. DeSalvo*, 136 C.A. 2d 156, 288 P. 2d 317.

retailer fails to collect the tax or to contract for reimbursement by the consumer at his peril. He still remains liable for the payment of the tax for, despite the provisions for passing on, the tax is legally a charge upon the retailer and not the consumer.⁹ It is clear that the retailer can absorb the tax, i.e., fail to pass it on by collecting it from the consumer, if he sees fit to do so without violating the law. All he cannot lawfully do is to advertise or hold out that he is doing so. This tax is thus legally a retailer's tax, not a consumer's tax, although economically it is passed on to the consumer. Yet in accounting practice the amounts collected as reimbursement from the consumer are excluded by retailers from their gross sales, and therefore from their "gross receipts".¹⁰

There is, therefore, no basis for a distinction between the beer excise taxes, on the one hand, and gasoline, phonograph excises and retail sales taxes, on the other

⁹*Meyer Construction Co. v. Corbett*, 7 F.Supp. 616; *People v. Herbert's of Los Angeles*, 3 Cal.App. 2d 482, 39 P. 2d 829; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. 2d 156, 777, 78 P. 2d 731, 738 (retailers required to pay sales tax on their receipts from retail sales to national banks, even though such banks are assumed to be instrumentalities of the federal government and sales tax on banks as consumers is not authorized by Section 5219, U.S. Revised Statutes).

¹⁰Economists consider commodity taxes and sales taxes to be alike in their incidence, the former merely being a less generalized form of the latter. Thus Due says (*Government Finance*, p. 281), "A commodity tax may be designed to reach all or a wide range of consumption expenditures or only those made for particular commodities. The former type is known as a *sales tax*; the second type as an *excise tax*." Both shift directly to the consumer. Due, op. cit., pp. 291, 293. The choice between the two types of taxes is dictated by administrative considerations. Shultz and Harriss, *American Public Finance*, p. 223. Extracts from Due's text are reproduced in the Appendix.

hand. All are intended by the legislative bodies which impose them to be consumers' taxes, all are consumers' taxes in economic effect, and all should be treated alike in their effect on taxpayers' "gross receipts" for measuring growth. Yet the retail sales tax and the excise taxes on gasoline and phonographs are normally excluded in accounting practice from all reports of gross sales. They generally do not appear anywhere in income tax returns. Obviously there is an administrative problem, and a serious one, if the "gross receipts" by which growth is to be measured include figures not shown on the tax returns for the period.

2. Respondent may, however, mean to suggest that the simple solution to the problem is to include in "gross receipts" whatever the taxpayer reported as "gross sales" in its tax returns. (Resp. Br. pp. 15, 24). That would indeed be a simple solution, but not, we think, one Congress could have had in mind. It would not wish two corporations otherwise alike to be taxed differently because of differing methods they adopted of classifying something which, in the years adopted, made absolutely no difference.

3. Respondent also seeks to liken the beer excise taxes to property taxes. The latter, of course, are not commodity taxes, they are not directly passed on to the consumer, and their imposition is not dependent on and postponed until the sale of the property. At least so far as the record shows, there is no practice anywhere of excluding an amount equal to property taxes from gross sales, such as exists for many excises essentially indistinguishable from the beer excises.

In seeking to draw the parallel to property taxes, respondent mistakenly argues (Resp. Br. 24) that petitioner's price scale is independent of the beer excises and does not vary with their amount or with their imposition. The record contradicts respondent. It shows the California beer tax was passed on to the consumer, by comparison of petitioner's California and Nevada prices. The following figures were compiled from the 1948 and 1949 price schedules of the petitioner appended to the Stipulation of Facts as Exhibit IV (not printed per stipulation of the parties):

<u>Product</u>	<u>California Sales Price</u>	<u>Nevada Sales Price</u>	<u>California Beer Tax</u>
24 11-oz. bottles	\$1.86	\$1.82	\$.04
12 32-oz. bottles	2.34	2.28	.06
24 12-oz. cans	2.45	2.41	.04½

The sales invoices for shipments to United States possessions, where neither federal nor state beer taxes apply, show the identical result. These invoices are appended to the Stipulation of Facts as Exhibit III (not printed per stipulation of the parties):

<u>Product</u>	<u>California Sales Price</u>	<u>Sales Price in U. S. Possessions</u>	<u>Federal & California Beer Taxes (in total)</u>	<u>Additional Export Costs</u>
		<u>1947</u>		
24 11-oz. bottles	\$1.73	\$1.88	\$.573	\$.72
24 12-oz. cans	2.28	1.69	.625	.03
24 11-oz. non- returnable bottles	2.08	1.58	.573	.03
		<u>1948-1949</u>		
24 12-oz. cans	2.45	1.86	.625	.03
24 11-oz. non- returnable bottles	2.24	1.70	.573	.03

Thus, taking for example the sales of Lucky Lager 12-ounce cans, 24 to the case, in 1948, it is obvious that the basic price of such beer is \$1.83 per case before any taxes or extraordinary costs are considered. In shipments to United States possessions where only three cents added export costs are involved, the price is \$1.86. However, in shipments to Nevada where the federal tax of 58 cents is applicable, the price is \$2.41 (\$1.83 plus 58 cents) plus the Nevada state beer tax. Again, when the sales price is figured for California where both the 58-cent federal tax and the 4½-cent state tax are applied, the sales price is \$2.45 (\$1.83 plus 58 cents plus 4½ cents).

That passing the tax on is not a mere privilege of the petitioner but an economic necessity is immediately apparent when one examines the relationship between petitioner's gross sales plus excise taxes, the tax on the sale of beer (Exhibit II of Stipulation of Facts, not printed per stipulation of parties) and its net income before income taxes as shown by petitioner's United States Corporate Income Tax returns (Exhibit I of Stipulation of Facts, not printed per stipulation of parties), for the years 1946 to 1949, as follows:

<u>Year</u>	<u>Tax Advanced on Beer Sales</u>	<u>Gross Sales Plus Excise Taxes</u>	<u>Net Income (before income taxes)</u>
1946	\$ 4,849,076.70	\$12,878,751.99	\$ 2,101,306.74
1947	5,687,831.75	16,311,138.47	1,927,143.71
1948	5,837,412.88	18,161,135.39	2,359,858.06
1949	7,192,289.27	23,003,696.22	3,838,767.00
Totals	<u>\$23,566,610.60</u>	<u>\$70,354,722.07</u>	<u>\$10,227,075.51</u>

The ratio between the above totals demonstrates that for each \$3.00 of gross sales petitioner pays \$1.00 in beer

taxes, but has a net income before income taxes of only 44 cents. Simple logic tells us that \$1.00 in taxes cannot be absorbed into 44 cents of profit. Absolute business necessity required, therefore, that petitioner be reimbursed for these taxes to remain in business.

Yet, despite the statutory classification of the beer tax as a sales tax and the fact that taxes are passed on to the consumer, the respondent has classified them as costs of production and has concluded from this that the reimbursements therefor are "gross receipts" of petitioner. His conclusion is mistaken, being based on a faulty premise.

4. Respondent has unduly minimized petitioner's rate of growth. He computes it on a volume basis at 23.66% (Resp. Br. 18), whereas the correct figure is over 25%. His error stems from two mistaken presumptions: one, he presumed all petitioner's sales were subject to the federal and California taxes, whereas much beer was sold in other states and was exempt from the latter, and some was sold in export and was exempt from both; two, as the price schedules show, petitioner made no sales in barrels during the base period, all its sales being in bottles and cans, and respondent has presumed barrel sales, whereas the effective rate differs on sales in fractional sizes not for statutory but for practical reasons. A 25% increase is equal to or greater than that Congress would have required absent price increases. See Pet. Op. Br. pp. 31-32. But when petitioner's volume increase, even on the incorrectly low basis calculated by respondent, is adjusted for the price increase which Congress took into account, petitioner's growth becomes 161% when

adjusted for average price increases, and 150.37% when adjusted for petitioner's own price increases.

5. Respondent's main reliance is on *Lash's Products Co. v. United States*, (1929) 278 U.S. 175. We pointed out in our opening brief at p. 48 that Congress had corrected the result reached in that case, and we suggested that for that reason Congress could not be supposed to have meant it to be applied in a statute adopted subsequent to that legislative correction. We also adverted briefly to one point on which that case is to be distinguished. In view of respondent's heavy reliance on that decision, we shall distinguish it now at greater length.

First, the tax in *Lash's Products* was a percentage of the "price for which sold". That phrase would certainly be broad enough to include a retailer's California sales tax collections, and even his use tax collections. Under California law, the retailer's right to collect either is one of contract.¹¹ The buyer pays them to the retailer to get the goods, as part of his purchase price. Yet even respondent seems to agree that a retailer's collections of California use tax are not part of his "gross receipts". (Resp. Br. 16.) The broader scope of the language interpreted in *Lash's Products* is thus evident.

Second, Treasury Regulations which the Court declared it was persuaded had been ratified by Congress required the result reached. Here there is no regulation in point, either old or new.

Third, the regulation specifically provided that the tax on a tax could be avoided by separate billing of the tax,

¹¹See cases cited footnote 8, supra.

and the Court thought that having failed to avail itself of relief contemporaneously afforded by the regulations, the taxpayer was in essence seeking relief from its own neglect. The instant case is different, because in neither the base period (1946-1949) nor any other period were there regulations advising taxpayers how to avoid having tax collections included in their gross receipts. Petitioner's mode of operation was meaningless tax-wise in the base period and essentially what respondent seeks is to give it retroactive significance. This the statute does not do.

6. Respondent apparently recognizes that the interpretation adopted below does not tend to promote uniformity of operation of the statute (cf. Resp. Br. 20-21), but on the contrary leads to discriminations of the kind one should hesitate to impute to Congress. His brief is replete with denials that Congress intended the statute to be an "accurate" test of growth (Resp. Br. 12, 18, 19, 20); respondent prefers that it be called an "objective" test¹² (Resp. Br. 12, 20) rather than an "accurate" one, in order to gloss over the discrimination and lack of uniformity necessarily flowing from his position. See Pet. Op. Br. pp. 34-39, inclusive, for demonstration of this discrimination and lack of uniformity.

Respondent must, of course, argue his case as best he can, and since he cannot deny the discriminatory and uniform consequences of his position, he probably has no

¹²The term "objective" hardly fits the case, for the statutory formula is to be determined from "subjective" facts, those drawn from each taxpayer's experience, and is to have "subjective" application to the net income of each taxpayer.

alternative but to belittle their significance. But their significance is so great as to be controlling. Even if the literal meaning of the statute were as respondent contends, it would be improperly adopted if it lead to absurd or even unreasonable results. As the Supreme Court said in *United States v. American Trucking Association*, (1940) 310 U.S. 534, 543:

“When (literal) meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.”

And as the Supreme Court said, when it commended a lower court for its refusal “to make a fortress out of the dictionary”, (*Markham v. Cabell*, (1945) 326 U.S. 404, 409):

“The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . .”

This Court said the same thing in different language in *Miller v. Bank of America N.T. & S.A.*, (CA 9, 1948) 166 F. 2d 415, 417. A most recent statement and application of the principle against literalness is in *Maestro Plastics Corporation v. N.L.R.B.*, (1956) 350 U.S. 270, 285. And perhaps the classic expression is in *Harrison v. Northern Trust Co.*, (1943) 317 U.S. 476, 479, like this a tax case, where the Supreme Court said:

“But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how ‘clear the words may appear on superficial examination’.”

Accordingly, even if the literal words of the statute were as clear as respondent contends, literalness would not suffice. We have demonstrated in our opening brief how the purpose of the statute will be satisfied if petitioner's excess profits are measured by the growth it had attained by 1949, the last year before hostilities began. We have demonstrated how uniformity both geographically and between industries will be prevented by respondent's interpretation and permitted by our own. In the circumstances, under the foregoing authorities of what significance is respondent's avowal of literal support?

7. The foregoing arguments we think answer respondent's search for interpretative material which we do not consider necessary in order to construe the Congressional definition of gross receipts in the case at bar. Respondent has nowhere shown why the phrase “amounts received from the sale or exchange . . . of property” should include amounts received in reimbursement of taxes levied upon the sale of such property in varying amounts and only upon some of the sales.

The respondent has supported himself upon the reed of asserting that if the word “total” is used we are required to blind ourself to the language which describes the amounts which are to be totalled, and cannot be permitted to exclude any amounts. But even that reed must

break under respondent, for he has failed to show that he commands even the literal support of the statute. Under the statute petitioner's gross receipts are "The total amount received or accrued from the sale . . . of stock in trade of the taxpayer or other property, etc." Respondent agrees that petitioner is not in the business of selling taxes, and, therefore, that these taxes are not its "stock in trade" or other qualifying property. (Resp. Br. 15.) Having thus admitted that these taxes are not stock in trade, respondent persists in arguing that the amounts reimbursing petitioner for these taxes are "amounts received from the sale . . . of stock in trade".

Respondent must agree that the taxes are the receipts of the governments to which they are paid, that those governments are the real parties in interest of the taxes, and that petitioner is only their fiscal agent in collecting them. Why, then, should they be *petitioner's* "gross receipts"? This respondent does not explain.

The statute would afford respondent literal support if it said specifically that excise tax reimbursements were includible in "gross receipts". This it does not do. To include them requires an interpolation into the literal language. But the statute defines the taxpayer's gross receipts in language which implies a beneficial receipt by the taxpayer, not a temporary receipt by it as fiscal agent for a government. Even respondent appears to agree that if petitioner collected the California use tax from the consumer, that tax would not be part of *petitioner's* gross receipts. (Resp. Br. 16.)

Literally, then, petitioner draws support from the statute. And the literal wording of the statutes interpreted

in the state cases we cited in our opening brief greatly resembles that herein, thus adding judicial support to our textual analysis.

CONCLUSION.

The decision of the Tax Court, based entirely on a mistaken concept of literal meaning of the statute, erroneously failed to give effect to the purpose of the statute and to give it uniform and reasonable effect. It should be reversed.

Dated, San Francisco, California,
April 23, 1957.

Respectfully submitted,

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(Appendix Follows.)



Appendix.

Appendix

Due, John F. (Professor of Economics, University of Illinois)—Government Finance, An Economic Analysis (Irwin, 1954), pp. 281-303.

P. 281. "From the standpoint of tax burden, commodity taxes are designed to do indirectly what a spending tax would do directly, namely, to distribute the cost of governmental activity in proportion to consumption expenditures. Commodity taxes are levied upon the sales (or output) of commodities and collected from the vendors; to the extent that the taxes are reflected in higher prices, individuals are essentially bearing the tax in the form of a tax supplement to the prices of the goods which they are buying and thus in relation to their consumption expenditures.

"A commodity tax may be designed to reach all or a wide range of consumption expenditures or only those made for particular commodities. The former type is known as a *sales tax*; the second type as an *excise tax*."

P. 291. "These exceptions do not appear to be of sufficient significance to destroy the basic rule: for the most part, any tax on sales or output tends to shift directly to the consumers of the products and is borne primarily in relation to consumer expenditures."

P. 293. "The analysis of the preceding pages is directly applicable to excise taxes. In large measure it is also relevant to the question of the shifting of a sales tax, which in a sense is merely a combination of a wide range of taxes on the sales of particular commodities."

H. S. Simons, *Federal Tax Reform* (University of Chicago Press, 1950), pp. 36-37.

“Fifth Proposal: *Elimination or radical reduction of excise taxes (especially on beer, liquors, tobacco, admissions, etc.) as an element in the federal revenue system.*

“These taxes, to my mind, are the worst elements in our revenue system. They are much more regressive than sales taxes. They are almost wholly concealed, precluding real awareness by individuals of their actual annual burden. They pander to misguided demands for sumptuary legislation, deriving strong support from alleged purposes which they are carefully designed *not* to serve. They pose as levies upon “luxuries,” while serving to divert expenditures not from the objects taxed but from “necessities.” Like corporation taxes, they are the revenue devices of political cowards who live in terror of voter-taxpayers and of government by intelligent discussion. The only cogent defense of them rests on the Calvinist premise that poor consumers of the objects in question are obviously damned for the next life and may properly be prepared now for their fate, by carrying what would otherwise be tax burdens of the elect.”

No. 15,334

IN THE

United States Court of Appeals
For the Ninth Circuit

LUCKY LAGER BREWING COMPANY,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

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FILED

JUL 24 1957

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

*To the Honorable Court of Appeals for the Ninth Circuit
and to the Judges thereof:*

Lucky Lager Brewing Company, a corporation, petitioner herein, respectfully petitions this Honorable Court and the Judges thereof for:

(1) a rehearing in bank of the appeal from the decision and order of The Tax Court of the United States entered on July 23, 1956;

OR IN THE ALTERNATIVE

(2) a rehearing before the Honorable Judges of the Court of Appeals for the Ninth Circuit who, on June 24, 1957, rendered the decision and judgment on the appeal herein, affirming the said decision and order of The Tax Court.

The petition is based upon the following grounds:

THE FACTS OF THE CASE.

We concede that if the state and federal excise taxes on beer which petitioner paid and thereafter collected are includible in the language which Congress used to define that portion of a taxpayer's receipts which result from sales of merchandise, petitioner cannot use that excess profits tax measure of its normal income permitted to "growth" corporations.

The evidence uncontradictedly shows:

That during the base period a federal tax of \$8 a barrel and state taxes in varying amounts were paid and thereafter collected by petitioner.

That the taxes were not separately stated in petitioner's invoices except that when a tax was *not* included, then the invoice referred to its exclusion.

That the taxpayer did not segregate the amounts of taxes collected, as such, either in its reports to shareholders or in its income tax returns.

That this taxpayer could have, with equal propriety, done the opposite in all of these things, namely: billed the tax separately and excluded the tax from the receipts both in its reports to shareholders and its income tax returns.

In brief, if one included it in receipts one would add a like amount to disbursements; if one excluded it from receipts one would exclude it from disbursements.

The evidence also showed not only that this taxpayer could have done the opposite, but that a large number and virtually all of large classes of other taxpayers did it the other way. It is further undisputed that at the time this

taxpayer chose this course of accounting it was proper and made no difference in any respect whatever to the taxpayer or to anyone else; that it in no way changed its tax situation or its taxable income, or taxes which it paid.

The Federal tax itself, by the terms of the statute, was imposed upon beer manufactured and sold (1939 Internal Revenue Code, Section 3150), and the same Federal Tax statute provided for a refund of the tax if the beer was not sold because it was lost or became unsaleable. (Id. Section 3154).

The opinion of the Chief Judge states the entire statute defining the term "gross receipts". It also states the question involved in this case, to wit: the construction of the language of the first subsection, (A), of that definition.

In construing a statute it frequently happens that an examination of the results that follow each of the possible constructions will be helpful in choosing the proper construction. For that reason we will briefly state, in terms of facts, the consequences which necessarily follow each of the two possible decisions of this Court.

THE RESULTS WHICH FOLLOW FROM EACH OF THE TWO POSSIBLE DECISIONS.

The question before this Court can be decided either way without making the least bit of difference to any taxpayer except those taxpayers upon whom excise taxes are levied in a dollar amount per unit of property, such as those on gallons of gasoline, barrels of beer, numbers of cigarettes, pounds of tobacco, etc.

The decision, of course, has no effect upon taxpayers who do not have excise taxes levied upon the merchandise which they sell or the services which they render.

Where the excise tax is levied in terms of a percentage of the sales price the decision of this Court either way on this question does not affect them because, when these taxpayers raise their prices, they, by their own act, raise the amount of the excise tax paid and collected by the same amount.

There is one situation in which excise taxpayers of both classes are affected. This situation is adverted to in the concurring opinion;—Where there is an original imposition of either type of excise tax or the increase of either type of excise tax, or the decrease of either type of excise tax.

In such cases the gross receipts, if they include the tax, will be affected favorably to taxpayer where a new tax is imposed or an existing tax is increased more than the selling price (or without an increase in the selling price), and adversely to taxpayer where the tax is increased less than the selling price, or decreased.

Otherwise, the only effect of this decision, one way or another, is to grant or deny to the class of taxpayers to which petitioner belongs the results which are applicable to all other taxpayers.

Under the present decision of this Court all classes of taxpayers, except the one to which petitioner belongs, would, if they had had the same growth as petitioner, have been entitled to use the growth formula.

If this Court should have decided the question the other way, it would not have changed the results as to these other taxpayers one particle, but it would have resulted in the class to which petitioner belongs reaching the required 150% upon the same amount of growth as the other taxpayers and would also have eliminated the possibility of any taxpayer of petitioner's class achieving that status solely by reason of the imposition of a new tax or a substantial increase of an existing tax.

GROUND'S OF THE PETITION.

The Court misinterpreted the arguments of petitioner and attributed to petitioner arguments which it did not make.

Its opinion is based on three fallacious lines of reasoning:

1. The Court adopted a construction of the language of subdivision (A) of Section 435(e) (5) which results in an obviously impossible meaning.

2. The Court appears to have believed that the choice by petitioner of a method of invoicing and accounting controlled its right to a subsequently enacted statutory privilege.

3. The Court, in support of its opinion, cites a case which deals with a question not here involved but which assumes as a fact the very thing we are trying to establish.

The concurring opinion recognizes that the result is unjust and that under this decision some taxpayers might be

unjustly enriched; we respectfully submit that the author of that opinion should reconsider it in the light of the fact that the only result of the opposite holding would be to eliminate this injustice as well as the possibility of the unjust enrichment.

Attributing to the word "total" the interpretation in the opinion of the Chief Judge, let us examine the meaning of the subsection.

The main opinion in effect states that the word "total" should be read as characterizing the receipts from each of the three kinds of property mentioned in subsection (A), to wit:

The total amount received from stock in trade;

The total amount received from property properly included in taxpayer's inventory;

The total amount received from the sale of property primarily held for sale.

If this is so the section then would read, in skeleton outline, as follows:

- (A) The total amount received or accrued during such period from the sale, exchange or other disposition of stock in trade of the taxpayer

OR

The total amount received or accrued during such period from the sale, exchange or other disposition of property of a kind which would be properly included in the inventory of the taxpayer

OR

The total amount received or accrued during such period from the sale, exchange or other

disposition of property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business.

AND

(B) The "Gross Income" from taxpayer's other business activities.

Congress' use of the disjunctive, we submit, completely disposes of this view of the meaning to be attributed to the word "total" in this subsection.

It clearly demonstrates that, as we have said, the word "total" is necessary only because the disjunctive was used and by its use Congress achieved the same effect which it would have achieved if it had used the conjunctive and omitted the word "total".

To use a construction of the word "total" which requires a choice of one of the three kinds of receipts from property, we respectfully submit, renders the result totally impossible.

This interpretation resulted, we think, from the Court substituting its independent concept of the meaning of the term "gross receipts" for the Congressional definition in the body of one subsection.

It should be pointed out here that the term "gross receipts" is one which is collectively used to describe the result of adding receipts from the sales detailed in subsection (A) to the gross income of taxpayer described in subsection (B). A title which describes two things cannot and should not be substituted for the expressed definition of one of those things.

Paragraph (5) of Section 435(e) defines “gross receipts” as the sum of the items set forth in subsection (A), specifying them disjunctively (“or” being used 5 times), and then connects (A) with (B) by the use of the conjunctive “and”. We contend that paragraph (5) itself—and the sequence and collocation of its words—demonstrates that the sense in which the lawmakers used the phrase “The total amount received or accrued” was for the purpose of *adding together (i.e. totalling) the several and distinct items*. When the Court speaks of “the *total* amount received or accrued . . . from the sale . . . of stock in trade”, with its own emphasis on the word “*total*”, and in the next sentence criticizes our contention as illogical, it is clear that the word “total” was erroneously treated in the sense of *the over-all amount received UPON the sale, including the excise tax*.

Erroneously, we think, the court has inserted in the language of subsection (A) the equivalent of the phrase “including excise taxes, if any”, and has isolated the word “total” and the phrase “stock in trade” from the other language of the subsection.

Congress has characterized language identical to that of subsection (A) by the title “net sales”. The Commissioner used the term “net sales” to describe petitioner’s argument.

In another subdivision of this same Section 435(e) Congress has defined “net sales” in the following language:

“(iii) the amount of the taxpayer’s net sales which is attributable to such product or class of similar products, for the calendar year 1946 is 5 per centum or less of the amount of its net sales so at-

tributable for the calendar year 1949. *For the purposes of this subparagraph, the term 'net sales' with respect to any period means the total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business; reduced by the amount of discounts, returns, and allowances paid or incurred for such period.*" (Section 435(e) (1) (B) (iii).) (Italics ours.)

The only difference in the language is the addition of a provision excluding returns, discounts and allowances which, by their very nature, would not be included in receipts. Such receipts would be reduced by those amounts either on the invoice to which applicable or as a credit on future invoices.

Where, therefore, there is any characterization by Congress of the language with which we are concerned, that characterization is the term "net sales".

The Commissioner concedes that if this is the correct characterization of the language we are right.

On page 16 of his brief, referring to the taxpayer's argument, he says:

"But that would be to make eligibility for use of the growth formula depend upon *net sales* or *net profit*, whereas the test provided by Congress is with respect to '*gross receipts*' (italics supplied), defined as including the 'total' amount received or accrued from the sale of stock in trade."

The term "net sales", which admittedly does not include excise taxes, is obviously a more accurate measure of petitioner's "increase in physical volume of production" which Congress stated to be the index for the growth formula (81st Congress, Second Session: Senate Report No. 2679, p. 27; House Report No. 3142, p. 24). The exclusion of reimbursements for such taxes eliminates a factor which in no way measures "physical volume of production" and accords with this legislative intent.

This Court seems to have indicated that petitioner's bookkeeping methods during a period prior to the enactment of the Excess Profits Tax Act of 1950 are persuasive as to the meaning of subsection (A) of Section 435(e)(5) (Opinion, p. 4, footnote 2). Such a holding leads inevitably to the untenable conclusion that the tax laws are to be interpreted differently for various taxpayers, depending upon the manner in which their books of account are kept.

The main opinion (p. 4 in Footnote 2) comments on the fact that the tax was not separately stated in petitioner's income tax returns or its reports to its stockholders, without noting that it would have been permissible for petitioner to have done the opposite, and without noting that other taxpayers did the opposite.

Seemingly the Court attached some significance to this fact, feeling possibly that petitioner should not now be heard to say that the amount of the tax was an amount separate and apart from the amount which it received for its beer.

Let us examine the results of such a rule. If this fact is persuasive, then a competitor of petitioner who had kept its books the other way would get the other treatment by this Court upon the same state of facts.

The facts are that a choice between accounting methods was made years or decades before the enactment of the statute. Which method was chosen at that time had no significance to anyone other than petitioner. To hold that only if petitioner chose one of those two methods is it entitled to a privilege subsequently enacted by Congress is, we feel, obviously erroneous. Congress cannot have intended that the measure of growth should be one thing for one taxpayer and another thing for another taxpayer, depending upon which choice of bookkeeping methods they had made years or decades before.

To say that accounting methods make a difference here is, in effect, to say that the same thing wasn't sold for the same price where in one case it was sold for "\$20 plus tax" and in the other case it was sold for "\$28" (where the tax was \$8 in each instance).

The reliance by this Court on the *Liggett & Myers* case has resulted in the erroneous application of a rule of purely constitutional law to a question of statutory construction. If at all material to the case at bar, the *Liggett & Myers* decision clearly recognizes the separate and identifiable existence of an excise tax from the price received for merchandise.

The only case cited in support of the decision is *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383, 81 L.ed. 294. That case is similar to this in two respects. (1st) both cases involve an excise tax on a unit basis (18 cents a pound on tobacco in one; \$8 a barrel on beer in the other) and (2) in *Liggett* the tax was on a commodity (tobacco) "hereafter sold by the manufacturer or importer, or removed for consumption or sale" and here the tax was on a commodity (beer) "manufactured and sold, or removed for consumption or sale" (emphasis

added)—both statutes conjoining “sale” with “manufacture”. But there the similarity ends.

The question presented for decision was purely a constitutional question on which the Supreme Court held that the effect of the tax upon the purchaser was indirect and imposed no prohibited burden on the State of Massachusetts under the rule of *Cornell v. Coyne*, and *Wheeler Lumber, Bridge & Supply Co. v. United States*.

The *Cornell case*, 192 U.S. 418, 48 L.ed. 504, and the *Wheeler case*, 281 U.S. 572, 74 L.ed. 1047, both presented constitutional questions and none of the three presented any such problem of statutory construction as that presented herein.

The precise question before the Supreme Court in the *Liggett & Myers case* was whether the Massachusetts Hospital should pay \$13.34 for its tobacco or \$13.34 plus \$17.28 tax on the 96 pounds, making a total of \$30.62. Specifically, it was a suit for a refund of the \$17.28 which had been paid for taxes.

In all of these cases the amount of money involved is the money paid for the tax. In none of these cases is the money paid for the merchandise involved.

To put it another way, all of these cases prove, by assuming as a fact, that the amount of money paid for the tax is a separate and identifiable thing. They further assume that by subtracting the exact amount of the tax one arrives at the price of the merchandise.

The concurring opinion concedes the injustice resulting from the decision of the Court. It also notes the danger of unmerited relief. But it does not note that the opposite decision would remove both injustices and would not change the results as to any taxpayer except those to which the decision is unfair and those who might gain undeservedly.

The concurring opinion concedes that the interpretation of the subsection by this Court results in an unfair and un-uniform application of the statute. Furthermore, it states a concern on account of its unfairness to Lucky Lager.

If the thought of the concurring opinion were pursued beyond the facts affecting this single taxpayer, it would be found that this interpretation is unfair to all taxpayers who are similarly situated with Lucky Lager, to wit:

Manufacturers of tobacco, matches, cigarettes, tires, tubes, gasoline and playing cards, as well as beer.

The opinion, however, justifies the concurrence in this unfairness without examining the consequences of an opposite holding.

We respectfully submit that our arguments addressed to the fallacy of the main opinion are immeasurably strengthened by a consideration of these consequences.

And, as we have said, this interpretation is not unfair—because it makes no difference—as to the many excise taxes which are stated in terms of a percentage of the selling price, such as automobiles and light bulbs, because the taxpayer can and does raise his own excise taxes by raising his prices.

It is not unfair to taxpayers who have no excise taxes involved, because when they raise their prices there is no distorting factor in their receipts.

The concurring opinion suggests that if the amount of the excise tax had been raised the opposite kind of injustice might present itself, but concludes that the court would have voted in favor of that injustice. The opposite conclusion to the present one would not have changed the results as to any taxpayer who is not subjected to this unfairness and would put those taxpayers who are subjected to this unfairness in exactly the same position as those who aren't.

CONCLUSION.

We respectfully submit, in endeavoring to summarize the errors of this decision, that the Court has rendered meaningless Congress' attempt to limit the receipts to those which had reference to physical volume of production. This was done, we feel, through disregarding the fact that Congress was at pains to limit subsection (A) to those receipts which would measure the volume of merchandise sold by a taxpayer in the ordinary course of its business.

In conclusion, we respectfully submit that if the Court looks for the meaning of subsection (A) in the statute itself and, if necessary, the titles which Congress has attributed to that language in companion statutes and to the language of the legislative history expressing the Congressional intent, and thereafter views the question

in the light of the alternative consequences, it should grant a rehearing in the case at bar.

Dated, San Francisco, California,

July 23, 1957.

Respectfully submitted,

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ARTHUR H. KENT,

VALENTINE BROOKES,

Counsel for Petitioner.

C. J. GOODELL,

ROBERT H. HEEB,

Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 23, 1957.

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